THE INDIAN CONSTITUTION

BY

SIR TEJ BAHADUR SAPRU, K.C.S.I., LL.D.

THE NATIONAL SECRETARY'S OFFICE

ADYAR, MADRAS, S.

1926

PREFACE

THIS volume was written two years ago, on the eve of the enquiry of the Reforms Committee in 1924, and is now reprinted with a few slight verbal alterations. Its object is simply to draw attention to the present Constitution in India. Criticism has been offered at certain places and comparisons instituted at others with similar provisions in the Constitutions of Canada, South Africa and the Australian Commonwealth. It does not profess to be an exhaustive commentary on the Government of India Act, for that is a task which must involve much more labor than I could possibly afford consistently with other calls on my time; nor does it put forward a constructive scheme for the Constitution of India. At the present moment, the question of the revision or the expansion of the Constitution is attracting considerable attention both in India and in England. There are those who think that, notwithstanding its many imperfections, the present Constitution should be given a fair trial at any rate up to 1929. There are others who call for an earlier revision of it. There are yet others, again, who think that India must frame her own Constitution. Whatever force there may be in any of these views, I am personally of opinion that the arguments which hold good to-day against a further advance will hold good.

equally in 1929. The real question is one of policy, and it is obvious that on such a question English and Indian opinion has differed in the past, is differing to-day, and, I am afraid, will continue to differ in the future. Meanwhile, apart from questions of policy, a mere study of the constitutional position cannot be useless. Indeed, it seems to me, it should be the basis of all well-informed criticism. It is mainly with a view to elicit criticism by drawing attention to the present constitutional position that I wrote this volume at the request of some friends. I desire to acknowledge with gratitude the valuable assistance rendered to me by Mr. B. Shiva Rao in the preparation of this volume.

ALLAHABAD
1st August, 1926

T. B. SAPRU

CONTENTS

THE INDIAN CONSTITUTION

PART I

INTRODUCTORY

IT may generally be said that the present Constitution of India is contained in the statute of Parliament known as the Government of India Act. The last amending Act was passed in 1919, and its preamble sets forth in detail the "declared policy of Parliament" which is to be followed in relation to India.

THE PREAMBLE

Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of the Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive realisation of Responsible Government in British India as an integral part of the Empire;

And whereas progress in giving effect to this policy can only be achieved by successive stages, and it is

expedient that substantial steps in this direction should now be taken; And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples;

And whereas the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility;

And whereas, concurrently with the gradual development of self-governing institutions in Provinces in India, it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities;

Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows, etc.

ANALYSIS OF THE PREAMBLE

(1) British India is to remain an integral part of the Empire; (2) Responsible Government in British India is the objective of the declared policy of Parliament; (3) Responsible Government is capable only of progressive realisation; (4) in order to achieve Responsible Government, it is necessary to provide for two things: (*a*) the increasing association of Indians in every branch of

the administration, and (*b*) the gradual development of self-governing institutions.

The second clause in the preamble says that progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps should "*now*" be taken.

The question may, therefore, be asked whether, upon a correct interpretation of the language of the preamble, it can be maintained that the words "declared policy" mean and imply that Parliament was, for the first time in 1919, making a declaration of an absolutely new policy towards India, or whether it was simply reiterating an old policy with a new emphasis and with a new determination to take substantial steps in giving effect to that "declared policy". Confining oneself to the mere words of the statute, and independently of the statements or declarations made by any responsible statesman, it would seem that the legitimate inference would be that the policy was already there and that, in the opinion of Parliament, the time had then arrived when some substantial steps should be taken to give effect to that policy. Historically, it cannot be denied that the process of association of Indians, howsoever slow and unsatisfactory, had already commenced. It is also true that the process of developing self-governing institutions had already been in operation. Extremely limited as the powers and functions of Councils and local bodies might have been before the Act of 1919, it would be impossible to deny that those bodies partook of the character of, or were intended to be, self-governing institutions. Their growth might have been arrested, but their existence could not be

denied ; nor could it be seriously maintained that if they were allowed to grow freely, they would not lead to Responsible Government.

At this stage it may be useful to recall how the whole question was approached in the message of His Majesty the King-Emperor and by Lord Chelmsford in the memorable speech which he delivered on 9th February, 1921, when he performed the opening ceremony of the Indian Legislature in the presence of H. R. H. the Duke of Connaught.

HIS IMPERIAL MAJESTY THE KING-EMPEROR'S MESSAGE TO THE INDIAN LEGISLATURE

Little more than a year has elapsed since I gave my assent to the Act of Parliament which set up a Constitution for British India. The intervening time has been fully occupied in perfecting the necessary machinery, and you are now at the opening of the first session of the Legislatures which the Act established. On this auspicious occasion I desire to send to you, and to the members of the various Provincial Councils, my congratulations and my earnest good wishes for success in your labors and theirs.

For years, it may be, for generations, patriotic and loyal Indians have dreamed of Swarâj for their Motherland. To-day you have the beginnings of Swarâj within my Empire, and widest scope and ample opportunity for progress to the liberty which my other Dominions enjoy.

On you, the first representatives of the people in the new Councils, there rests a very special responsibility. For on you it lies, by the conduct of your business and the justice of your judgments, to convince the world of the wisdom of this great constitutional change. But on you it also lies to remember the many millions of your fellow-countrymen who are not yet qualified for a share in political life, to work for their upliftment and to cherish their interests as your own.

I shall watch your work with unfailing sympathy, and with a resolute faith in your determination to do your duty to India and the Empire.

LORD CHELMSFORD'S SPEECH

The history of constitutional developments in India under British rule falls into certain fairly well-defined stages. The first of these may be said to have terminated with the Act of 1861. During this period the British Government were engaged in extending and solidifying their Dominions, in evolving order out of the chaos that had supervened on the break-up of the Mughal Empire, and in introducing a number of great organic reforms, such as the improvement of the Police and the Prisons, the codification of the Criminal Law, and the establishment of a hierarchy of Courts of Justice and of a trained Civil Service. The main achievement of administration was, in fact, the construction and consolidation of the mechanical framework of the Government. The three separate Presidencies were brought under a common system, and the legislative and administrative authority of the Governor-General in Council was asserted over all the Provinces and extended to all the inhabitants; while, at the same time, provision was made for local needs and local knowledge by the creation or recreation of local Councils. And it is significant that in the Act which closed this chapter, the principle of associating the people of India with the government of the country was definitely recognised. The Councils set up by this Act were still merely legislative committees of the Government, but the right of the public to be heard and the duty of the Executive to defend its measures were acknowledged, and Indians were given a share in the work of legislation.

The second stage terminated with the Act of 1892. The intervening period had witnessed substantial and many-sided progress. Universities had been established, secondary education had made great strides ; and Municipal and District Boards had been created in the major Provinces. A limited but important section of Indian opinion demanded further advance, and the justice of this demand was recognised by the British Government in the Act of 1892. This Act conferred on the Councils the right of asking questions and of discussing the Budget, and, to this extent, admitted that their

functions were to be more than purely legislative or advisory. But its most notable innovation was the adoption of the elective principle. It is true that technically all the non-official members continued to be nominated; and inasmuch as the recommendations of the nominating bodies came to be accepted as a matter of course, the fact of election to an appreciable proportion of the non-official seats was firmly established. The Act of 1861 had recognised the need for including an Indian element in the Legislative Councils. The Act of 1892 went further. It recognised in principle the right of the Indian people to choose its own representatives on the Councils.

The third stage will always be associated with the names of Lord Morley and Lord Minto. The experience of the Reforms of 1892 had been, on the whole, favorable. The association of the leaders of the non-official public in the management of public affairs had afforded an outlet for natural and legitimate aspirations and some degree of education in the art of government. But the impulses which had led to the Reforms of 1892 continued to operate, and they were reinforced by external events, such as the Russo-Japanese War. Important classes were learning to realise their own position, to estimate for themselves their own capacities, and to compare their claims for equality of citizenship with those of the British race. India was, in fact, developing a national self-consciousness. The Morley-Minto Reforms were a courageous and sincere effort to adjust the structure of the Government to these changes. The Legislative Councils were greatly enlarged, the official majority was abandoned in the local Councils, and the principle of election was legally admitted. No less significant were the alterations made in the functions of the Councils. These were now empowered to discuss the Budget at length; to propose resolutions on it and to divide upon them; and not only on the Budget, but in all matters of public importance, resolutions might be moved and divisions taken. It was hoped by the authors that around this Constitution conservative sentiment would crystallise, and that for many years no further shifting of the balance of power would be necessary. These anticipations have not been fulfilled; and from the vantage point of our later experience, we can now see that this was inevitable. The equilibrium temporarily established was of a kind that could not for long be maintained. The forces which had led to the introduction of these Reforms continued to gain

in intensity and volume; the demand of educated Indians for a larger share in the government of their country grew year by year more insistent; and this demand could find no adequate satisfaction within the frame-work of the Morley-Minto Constitution. This Constitution gave Indians much wider opportunities for the expression of their views, and greatly increased their power of influencing the policy of Government and its administration of public business. But the element of responsibility was entirely lacking. The ultimate decision rested in all cases with the Government, and the Councils were left with no functions save that of criticism. The principle of autocracy, though much qualified, was still maintained, and the attempt to blend it with the Constitutionalism of the West could but postpone, for a short period, the need for reconstruction on more radical lines.

Such then was the position with which my Government were confronted in the years 1916-17. The conclusion at which we arrived was that British policy must seek a new point of departure, a fresh orientation. On the lines of the Morley-Minto Reforms there could be no further advance. That particular line of development had been carried to the farthest limit of which it admitted, and the only further change of which the system was susceptible would have made the legislative and administrative acts of an irremovable Executive entirely amenable to elected Councils, and would have resulted in a disastrous deadlock. The Executive would have remained responsible for the government of the country, but would have lacked the power to secure the measures necessary for the discharge of that responsibility. The solution which finally commended itself to us is embodied in principle in the declaration which His Majesty's Government, in full agreement with us, made in August, 1917. By that declaration, the gradual development of self-governing institutions with a view to the progressive realisation of Responsible Government was declared to be the goal towards which the policy of His Majesty's Government was to be directed. The increasing association of the people of India with the work of government had always been the aim of the British Government. In that sense, a continuous thread of connection links together the Act of 1861 and the declaration of August, 1917. In the last analysis, the latter is only the most recent and most memorable manifestation of a tendency that has been operative throughout

British rule. But there are changes of degree so great as to be changes of kind, and this is one of them. For the first time the principle of autocracy, which had not been wholly discarded in all earlier reforms, was definitely abandoned; the conception of the British Government as a benevolent despotism was finally renounced; and in its place was substituted that of a guiding authority whose rôle it would be to assist the steps of India along the road that, in the fulness of time, would lead to complete Self-Government within the Empire. In the interval required for the accomplishment of this task, certain powers of supervision, and, if need be, of intervention, would be retained, and substantial steps towards redeeming the pledges of the Government were to be taken at the earliest moment possible.

I shall not attempt to recount in detail the processes by which subsequently the new policy was given definite form and expression in the Act of 1919. They are set out in documents all of which have been published.

It will thus be noticed that the expression, "successive stages," as used in the second clause of the preamble, cannot possibly exclude the stages of progress already achieved by India up to the moment when the Act of 1919 was passed; and it would be wholly unwarranted to hold that, for the purposes of the realisation of Responsible Government, the first stage must be deemed to have commenced with the passing of the Act of 1919.

The third clause of the preamble provides that the time and manner of each advance can be determined only by Parliament, and it is recognised in it that "the responsibility for the welfare and advancement of the Indian peoples" lies on Parliament. This clause has been severely criticised in certain political quarters in India as excluding, by necessary implication, the moral right of Indians to determine the time and manner of each advance. Constitutionally, Parliament is sovereign, and until India has got complete Responsible Government, it

is correct in that sense to say that the responsibility for its welfare and advancement lies upon Parliament. But this constitutional position is by no means incompatible with the undoubted right of all subjects of the King to say when and how and on what lines further advance should be secured. No doubt, when such a demand is made by the people, Parliament may, constitutionally, claim the right to be satisfied that it is a proper demand and conforms to the tests laid down in the fourth clause.

The tests laid down in the fourth clause for the guidance of Parliament in regard to the time and manner of each advance are two: (*a*) " The co-operation received from those on whom new opportunities of service are conferred "; and (*b*) " the extent to which experience shows that confidence can be reposed in their sense of responsibility ". These tests necessarily involve questions of fact.

At this stage it may be necessary to supplement the consideration of this clause of the preamble by a reference to S. 84 A (2) of the Government of India Act. The Commission, which is to be appointed at the expiration of ten years after the passing of the Government of India Act of 1919, is required to enquire into: (1) The working of the system of Government, (2) the growth of education, (3) the development of representative institutions in British India and matters connected therewith. Having enquired into these matters, the Commission is to report: (1) As to whether and to what extent it is desirable to establish the principle of Responsible Government, (2) or to extend or modify the degree of Responsible Government, then existing in India, including the question whether the establishment of Second Chambers in

the Local Legislatures is or is not desirable. The Commission may also enquire into and report on any other matter affecting British India and the Provinces which may be referred to the Commission by His Majesty; *vide* S. 84 (3).

Can it be said that there is anything in the nature of an inconsistency between the preamble and clauses (2) and (3) of S. 84 A? Can it, further, be urged that S. 84 A adds to the tests laid down by the preamble? *Prima facie*, there does not seem to be any inconsistency between the preamble and S. 84 A (2). The co-operation and the confidence in the sense of responsibility of the people, on whom new opportunities of service are conferred, must be judged in the light of the system of Government, the growth of education, the development of representative institutions and matters connected therewith. If the Commission is satisfied about the growth of education and the development of representative institutions, some of the important tests would have been fulfilled. But in addition to these and cognate matters, it will also have to satisfy itself as to the working of the system of Government. Now, as regards this, if the Commission comes to the conclusion that the system of Government has worked well, and that, in working that system, those who were entrusted with it have shown a due sense of responsibility, there is no reason why there should not be further development. If, on the other hand, the Commission finds that the system of Government has not worked well, then it must make recommendations for a change in that system, so as to achieve the object laid down in the preamble. It is true that the language of S. 84. A (2) is not as precise as it might, and should,

have been; but taking a broad view of it, and reading it along with the preamble, it is not difficult to have an approximately correct idea as to what the object of Parliament was.

Coming next to the penultimate clause of the preamble, it is to be observed that Parliament considered it expedient, concurrently with the gradual development of self-governing institutions in the Provinces of India, to give to those Provinces the largest measure of independence of the Government of India compatible with the due discharge by the latter of its own responsibilities. Now, so far as this clause is concerned, there are two observations to be made. In the first place, the largest measure of independence is not synonymous with the largest measure of Responsible Government. A Province may enjoy the largest measure of independence of the Government of India, and yet it may not have an equally large measure of Responsible Government. Secondly, there are two checks imposed on the independence of the Provinces. The first of them is the express check exercised by the Government of India. The second is the implied check of the Secretary of State for India to whom the Government of India is subordinate. The Secretary of State may, in accordance with the Act, relax his control over the Government of India.

GENERAL OBSERVATIONS ON THE PREAMBLE

The preamble practically embodies the announcement of policy made by Mr. Montagu in the House of Commons on 20th August, 1917. It leaves no room for doubt that the ultimate object is the establishment of Responsible

Government. But the provision with regard to successive stages and the reservation of the power to determine the time and the manner of each advance have caused in this country widespread dissatisfaction.

PART II

THE CROWN

S. 1 of the Government of India Act vests the territories in India in His Majesty, who is the head of the Constitution and in whose name the country is governed. There are certain powers specifically reserved to the Crown.

POWERS OF THE CROWN

His Majesty may remove from office any member of the Council of India on an address of both Houses of Parliament (*vide* S. 7). His Majesty in Council exercises certain powers with regard to the establishment of the Secretary of State in Council (*vide* S. 17). The Crown appoints an auditor of the accounts of the Secretary of State in Council (*vide* S. 27), the High Commissioner for India (*vide* S. 29 A), the Governor-General (*vide* S. 34), the members of the Governor-General's Executive Council (*vide* S. 36), Governors (*vide* S. 46) and the members of a Governor's Executive Council (*vide* S. 47). The approval of the Crown is necessary for the constitution of a new Province under a Lieutenant-Governor (*vide* S. 53) and the appointment of a Lieutenant-Governor (*vide* S. 54).

The assent of His Majesty is necessary under S. 67 B (2) to enable an Act, which has been certified by the Governor-General, to have effect. Bills may be reserved for His Majesty's pleasure under S. 68 and vetoed by His Majesty under S. 69. A Bill passed by the certificate of a Governor cannot have effect without the signification of the assent of His Majesty in Council (*vide* S. 72 B). A Legislative Council for a new Lieutenant-Governorship cannot be created without the sanction of His Majesty (*vide* S. 77). The Governer-General may reserve a provincial Bill for the signification of His Majesty's pleasure without which it cannot have validity (*vide* S. 81 A 3). The power of veto is reserved to the Crown in regard to Acts of a Local Legislature (*vide* S. 82). The Statutory Commission provided for by S. 84 A requires the approval of His Majesty. Permanent Chief Justices and Judges of High Courts are appointed by His Majesty under S. 101. Additional High Courts can only be established under Letters Patent under S. 113. The Crown may disallow any order of the Governor-General in Council altering the limits of jurisdiction of High Courts (*vide* S. 109). Advocates-General are appointed by His Majesty under S. 114. His Majesty has certain powers in regard to the ecclesiastical establishment (*vide* Ss. 115, 116, 118, 120 and 121). Lastly, His Majesty may annul rules framed under S. 129 A.

The powers vested in the Crown are presumably exercised upon the advice of the constitutional Minister or Ministers in England. Of the powers enumerated above, there are some which will always have to remain with the Crown, as they do in the case of the self-governing Dominions, whatever may be the restrictions

imposed by constitutional practice or usage on the exercise of those powers. Such indispensable powers may be illustrated by reference to the appointment of the Governor-General and the Governors and to the power of veto. It is obvious, however, that the powers of the Crown generally cannot be affected or modified by the exercise of any rule-making power vesting either in the Secretary of State or the Governor-General in Council. Those powers can only be dealt with by an Act of Parliament.

PART III

THE SECRETARY OF STATE

SALARY OF THE SECRETARY OF STATE

THE legal and constitutional position of the Secretary of State for India is prescribed by S. 2 of the Government of India Act. By clause 1 of that section, and subject to the provisions of this Act, the Secretary of State (1) has and performs all such or the like powers and duties relating to the Government or the revenues of India; and (2) has all such or the like powers over all officers appointed or continued under this Act. Before the passing of the Government of India Act of 1858, these powers and duties were exercised or performed by the East India Company, or by the Court of Directors, or the Court of Proprietors of that Company, either alone or by the direction, or with the sanction or the approbation, of the Commissioners for the Affairs of India. Briefly put, the measure of his powers and duties is that of the powers and duties of the East India Company, or the Court of Directors, or the Court of Proprietors, or the Commissioners for the Affairs of India before the Act of 1858. Those powers may be exercised over all officers appointed or continued under the Act. Under clause 2, subject to

the provisions of this Act, or the rules made thereunder, the Secretary of State is vested with the general powers of superintendence, direction and control over all acts, operations and concerns which relate to the Government or revenues of India. He exercises control over grants of salaries, gratuities and allowances and all other payments and charges out of, or on, the revenues of India. Now, these two clauses, and particularly clause 2, confer on the Secretary of State complete administrative and financial control over the Government of India subject, of course, to the provisions of the Act or the rules made thereunder. When we have examined the other provision of the Act and the rules made under it, we shall have a fair idea of such limitations as exist on the control of the Secretary of State. It may, however, be safely said at this stage that, making allowance for those limitations, the residuum of control, both administrative and financial, exercised by the Secretary of State in relation to the Government is so enormously large that it is impossible to hold, constitutionally, that the Government of India enjoys any large measure of independence.

Before examining these limitations, with a view to have some idea of the measure of independence enjoyed by the Government of India, let us examine clause 3 of S. 2 which was inserted by the Act of 1919. By that clause the salary of the Secretary of State is placed on the British estimates. But the salaries of his Under-Secretaries and any other expenses of his department may be paid out of the revenues of India, or out of monies provided by Parliament. Now, it was not as if this was intended to fix the Secretary of State for the first time with responsibility to Parliament. That responsibility has always been there

since his creation. This amendment was a concession to political sentiment widely prevalent in India and, to some extent, in certain quarters in England, and it was therefore considered desirable to place his salary on the British estimates, so as to enable Members of Parliament to discuss Indian affairs in a more pointed and effective manner. It may, therefore, be said that the Secretary of State is constitutionally the agent of Parliament, but an agent with plenary powers excepting where any limitations have been imposed on those powers either by statute or by statutory rules.

Analysis of the Administrative, Financial and Legislative Control of the Secretary of State

By S. 33 of the Act, the Governor-General in Council is required to pay due obedience to such orders as he may receive from the Secretary of State in regard to the civil and military government of India. Now this section, read with S. 2, which has already been discussed, completes the subordination of the Government of India to the Secretary of State. But there are certain specific powers which the Secretary of State exercises under the statute, or which he exercises as the constitutional adviser of the Crown, which must also be taken into account in judging the extent of the supremacy of the Secretary of State.

He is presumably the adviser of the Crown in regard to the appointment of the Governor-General under S. 34, of members of the Governor-General's Executive Council under S. 36, of Governors under S. 46, of members of

Governors' Executive Councils under S. 47, of Lieutenant-Governors under S. 54, of the Public Services Commission under S. 96 C, of the Auditor-General in India under S. 96 D, of Chief Justices, Judges and Advocates-General of High Courts under Part IX and of the Bishops of Calcutta, Madras and Bombay under S. 118. It is clear that the Crown's prerogative to appoint the Governor-General or the Governors cannot be affected by any development of the Constitution. But there does not seem to be any reason why, so far as the other appointments enumerated above are concerned, they should continue to be made upon the recommendation or advice of the Secretary of State.

Apart from the question of appointments, the administrative control of the Secretary of State is exercised in many ways. There are some matters which cannot be initiated without his previous approval or assent or sanction. Sometimes such approval, assent or sanction is given *ex-post facto*. Again, there are some matters which are required by statute or practice or usage to be reported to the Secretary of State. Leaving aside the control over legislation, which is vested in him by special provisions of the statute, ordinary matters of administration, involving the taking of some important step or raising questions of policy, are referred to him by despatches or by cablegrams. It is impossible here to refer to all those matters which are referred to the Secretary of State as a matter of practice or usage or by virtue of his directions conveyed in one way or another, though there is every reason to believe that the number of despatches and cablegrams which pass between the Government of India or the Governor-General and the

Secretary of State is amazingly large. We may therefore confine ourselves to those instances of the exercise of his control which are provided for by the statute itself.

Under S. 41, if the Governor-General is of opinion that any measure, affecting the safety, tranquillity or interests of British India, which is proposed before the Governor-General in Council, should be adopted and carried into execution, or that it ought to be suspended or rejected, and the majority of those present at the meeting of the Council dissent from that opinion, the Governor-General may, on his own authority and responsibility, adopt, reject or suspend the measure in whole or in part. In such a case, any two members of the Council may require that the matter should be reported to the Secretary of State.

Under S. 44, the Governor-General in Council, subject to certain conditions laid down therein, may not, without the express orders of the Secretary of State in Council, make war or treaty; and in the event of commencing any hostilities, or making any treaty, he is required to communicate forthwith the same, with the reasons therefor, to the Secretary of State.

S. 45 A is one of the most important sections dealing with the classification of Provincial and Central subjects; with the transfer, from among Provincial subjects, of subjects to the administration of the Governor acting with the Ministers; and with the allocation of revenues or moneys for the purposes of such administration. It authorises the power of making rules for the devolution of authority to the Local Governments and for the employment of Local Governments by the Central Governments as their agents and for the determination

of the financial conditions of such agency. It also provides (*a*) for rules being framed for fixing the contributions payable by Local Governments to the Central Government; (*b*) for the constitution of a Finance Department in any Province and the regulation of the functions of that Department; (*c*) for regulating the exercise of the authority of Local Governments over the Public Services; (*d*) for the settlement of doubts arising as to whether any matter does, or does not, relate to a Provincial subject or a Transferred subject; and (*e*) for the treatment of matters which affect both—a Transferred subject and a Reserved subject. These rules are subject to the proviso that they cannot authorise the revocation or suspension of the transfer of any subject except with the sanction of the Secretary of State in Council. Clause 3 of this section provides a limitation on the powers of superintendence, direction or control exercised by the Governor-General in Council over Local Governments, namely, that those powers of superintendence can be exercised only for such purposes as may be specified in the rules. Rule 49 of the Devolution Rules which have been framed under this section shows the limitation of these powers.

The powers of superintendence, direction and control over the Local Government of a Governor's Province vested in the Governor-General in Council under the Act shall, in relation to Transferred subjects, be exercised only for the following purposes:

(1) To safeguard the administration of Central subjects;

(2) to decide questions arising between two Provinces, in cases where the Provinces concerned fail to arrive at an agreement; and

(3) to safeguard the due exercise and performance of any powers and duties possessed by, or imposed on, the Governor-General in Council under, or in connection with, or for the purposes of, the following provisions of the Act, namely, S. 29 A, S. 30 (A), Part VII A, or of any rules made by, or with the sanction of, the Secretary of State.

Now, it must be borne in mind that the present relation of the Government of India to the Local Governments and the working of the system of Diarchy depend, to a considerable extent, on the rules framed under this Section and also other Sections. In the final shaping and determination of these rules, the Secretary of State has had a considerable share, and although apparently he cannot interfere with the working of the Transferred departments to the extent to which he can with the Reserved departments, yet in actual practice, it would seem that the amount of influence or control which he exercises indirectly is one which cannot be ignored. As regards this indirect influence of the Secretary of State, it makes itself felt mainly in regard to questions affecting the Public Services and the working of the Finance Department. As matters stand at present, Ministers have no power of control over members of the All-India Services; they cannot select their Secretaries from outside the Services whose interests are protected; and if sometimes in the exercise of their power, and in the view that they take of certain rules, their choice falls on any member of a Service which does not ordinarily possess a lien on certain appointments, at once there is dissatisfaction with the Ministers, and instances are known in which the Ministers' fairness has been challenged. They have, subject to certain conditions, got the right of appeal; and the Ministers always feel that the Services being the peculiar

charge of the Secretary of State, their position is far from being enviable.

Rule 27 of the Devolution Rules read with Schedule III lays down the powers of sanctioning expenditure in the Transferred departments:

(1) The Local Government of a Governor's Province shall not, without the previous sanction of the Secretary of State in Council, or of the Governor-General in Council, as the case may be, include any proposal for expenditure on a Transferred subject in a demand for a grant, if such sanction is required by the provisions of Schedule III to these rules.

(2) Subject to the provisions of sub-rule (1), the Local Government of a Governor's Province shall have power to sanction expenditure on Transferred subjects to the extent of any grant voted by the Legislative Council.

(3) The Local Government of a Governor's Province shall have power to sanction any expenditure on Transferred subjects which relates to the heads enumerated in S. 72 D (3) of the Act, subject to the approval of the Secretary of State in Council or of the Governor-General in Council, if such approval is required by any rule for the time being in force.

In regard to financial matters, the Secretary of State's control, as already stated, makes itself felt indirectly. Under Rule 36 of the Devolution Rules, the Finance Department in a Province must always be under the control of a member of the Executive Council, and with one or two exceptions the Finance Member is everywhere a member of the Civil Service. Under the Finance Member there is the Financial Secretary who also is a member of the Indian Civil Service, but Ministers have been given the right to ask for the appointment of a Joint Secretary who is specially charged with the duty of examining and dealing with financial questions arising in relation to Transferred subjects and the proposals for taxation or borrowing put forward by any Minister. A perusal of

Rule 37 will give some idea of the degree of dependence of the Transferred half of the Government on the Finance Department, and indirectly on the Government of India and the Secretary of State who are the ultimate controlling authorities. The right of proposing an increase or reduction of taxation does not belong to the Ministers. They must submit schemes of new expenditure for which it is proposed to make provision in the estimates to the Finance Department which examines and advises upon them. The Finance Department is bound to decline to provide in the estimates for any scheme which it has not examined. It is somewhat significant that although the statute does not debar a Minister from holding charge of Finance Department, yet that is the effect of the Devolution Rules.

FINANCIAL CONTROL

As regards financial control, S. 21 gives power to the Secretary of State in Council, subject to the provisions of the Act and its rules, of expenditure over the revenues of India. The purposes for which the revenues of India may be applied are indicated in S. 20. By S. 22 those revenues cannot be applied to defraying the expenses of any military operations carried on beyond the external frontiers of India, except with the consent of both Houses of Parliament. It is obvious that such consent must to a very great extent depend on the view that the Secretary of State takes of their necessity or propriety.

Ordinarily, the Secretry of State may, with the concurrence of a majority of votes at a meeting of the

Council of India, enter into any contracts for the purposes of the Government of India (*vide* S. 29), though this power has to a certain extent been qualified by the appointment in recent years of a High Commissioner for India. There are still large powers of control which the Secretary of State exercises over Indian finances, but they will be best appreciated when we discuss, first, the control which he exercises over our legislation; and secondly, the duties which he discharges in relation to the All-India Services.

Legislative Control

Apart from the serious limitations imposed upon the legislative powers of the Indian Legislature and the Provincial Councils, which will be dealt with separately, the number of sections in the Act which directly vest in the Secretary of State some power of control over the Indian Legislature is extremely small. And yet it is impossible to realise the vast extent of the control which he exercises in this behalf without some direct knowledge and experience of the actual practice followed in regard to such matters by the Government of India and the Local Governments. So far as the Government of India is concerned, there is scarcely a piece of important legislation which is not previously reported to the Secretary of State either by despatch or by cablegram, even when his previous sanction is not sought. So far as the Local Legislatures are concerned, the direct control is not vested by statute in the Secretary of State, but in the Governor-General. But as in theory, and also in general practice, the Government of India is subject to

the control of the Secretary of State; the latter exercises, though indirectly, to no small extent, control over the Local Legislatures also.

DIRECT CONTROL

S. 65 prescribes the limit of the powers of the Indian Legislature to make laws. But Clause 3 places a serious limitation on it. It is so important that it may be reproduced *in extenso:* "The Indian Legislature has not power, without the previous approval of the Secretary of State in Council, to make any law empowering any Court other than a High Court to sentence to the punishment of death any of His Majesty's subjects born in Europe, of the children of such subjects, or abolishing any High Court."

It was under this clause that, when the Racial Distinctions Bill, giving power to Sessions Judges to pass sentences of death on European British subjects, was introduced in the Assembly in 1923, the Government of India had first to secure the previous approval of the Secretary of State who asserted his right of modifying the original proposals of the Government of India.

The second power which the Secretary of State exercises arises in connection with the Crown's power of veto exercised under S. 69. Every Act of the Indian Legislature has to be sent by the Governor-General, after he has given his assent to it, to the Secretary of State, and then His Majesty may signify his disallowance of it. But it is true that this power of veto is very seldom exercised; and when one bears in mind that, in theory at any rate, this power exists in relation to the self-governing Dominions, constitutionally no exception can be taken to

it. It is obvious that the Crown must depend upon the advice of its constitutional advisers.

Special Powers of Legislation

The Governor-General in Council has a special power of legislation by passing Regulations for the peace and good government of certain minor administrations, such as the N.-W. Frontier Province, Ajmer-Merwara and Coorg. This power is exercised under S. 71 and is obviously subject to the control of the Secretary of State in Council or the Secretary of State (*vide* clauses 3 and 4).

The Governor-General alone, as distinguished from the Governor-General in Council, has power to make Ordinances for a period of not more than six months for the peace and good government of British India or any part thereof; and this power too is subject to like disallowance as an Act passed by the Indian Legislature. In actual practice, however, even though the Governor-General may issue an Ordinance without previous reference to the Secretary of State, he would lose no time in reporting it to the Secretary of State.

Local Legislatures

The powers of the Local Legislatures are specified in S. 80 A. Under clause 3 of the section, a Local Legislature has not the power, without the previous sanction of the Governor-General, to make or to take into consideration, any one of the laws specified in the sub-clauses attached thereto. Under S. 82, all Acts of Local Legislatures are submitted to the Secretary of State for the

purposes of the veto of the Crown. These provisions have already been commented upon above, and do not call for any fresh remarks.

It is, however, important to bear in mind the rules framed under S. 80 A (3) (h), which are technically known as the Local Legislatures' Previous Sanction Rules. A schedule of protected Acts is attached to these rules, and none of those Acts or those contemplated by Rule 2 (1) can be repealed or altered by a Local Legislature without the previous sanction of the Governor-General. Equally important are the rules framed under S. 81 A (1) of the Act which are known as the Reservation of Bills Rules. These rules provide for (1) the compulsory reservation of certain Bills for the consideration of the Governor-General which have not been previously sanctioned by him, and (2) the optional reservation of certain other Bills under similar conditions. One general remark may suffice, and it is this: though the Secretary of State does not come in anywhere directly, the Governor-General's subordination to him gives him a powerful voice, if not a palpable control, in regard to Provincial legislation.

To sum up: (1) S. 2 of the Government of India Act gives the Secretary of State plenary powers of superintendence, direction and control over the Government of India and its revenues and over all officers appointed or continued under the Act. (2) Constitutionally, he is not and cannot be responsible to the people of India, but to Parliament. Other sections which have been noticed above give him specific administrative, financial or legislative control over the Government of India or the Local Governments and the Indian and the Local Legislatures. (3) Such control is in regard to certain matters

direct and in regard to other matters indirect. (4) The extent of his direct control is limited; and the sections dealing with it are not many. The extent of his indirect control is not so apparent, but in point of fact is very large. It is impossible to have an accurate idea of the degree and extent of his indirect control without a personal knowledge of the working of the administrative machinery. It is, however, inevitable that so long as the Secretary of State owes responsibility to Parliament for this country, he should be competent to exercise his power of superintendence, direction and control in regard to every field of administration, excepting where the exercise of such power is barred by express provisions of the statute, or the statutory rules, or by convention. As regards conventions, assuming that there is an appreciable number of them in existence, such conventions must be of a very fluid and undefined character, so long as the Constitution remains what it is.

It is obvious, therefore, that complete responsibility in the Government of India, or the autonomy of the Provinces is wholly out of the question without this power of the superintendence, direction or control of the Secretary of State being abolished; and the abolition of this power is impossible without the direct intervention of Parliament. In one word, Parliamentary legislation alone can achieve that end.

ADVANCE BY RULES

But, it is urged, it is possible to achieve advance by the exercise of the rule-making power. This position requires careful examination.

There is provision made for the making of rules for the relaxation of the control of the Secretary of State by S. 19 A. Before examining the provisions of S. 19 A, it is necessary to call attention to the provisions of S. 131: (1) " Nothing in this Act shall derogate from any rights vested in His Majesty, or *any powers of the Secretary of State in Council* in relation to the Government of India." It is true that the authority spoken of here is the Secretary of State in Council and not the Secretary of State. But the Secretary of State in Council is the very authority spoken of in S. 19 A. An interesting question at once arises: How can S. 131 be reconciled with S. 19 A? Assuming that certain rules are framed under S. 19 A which result in the relaxation of the control of the Secretary of State or the Secretary of State in Council, would it not then be open to the Secretary of State in Council to say that notwithstanding the rules framed under S. 19 A, his powers remain unaffected by virtue of S. 131? If he can take shelter behind S. 131, the relaxation under S. 19 A cannot constitutionally amount to very much. It will be observed that S. 19 A of the Government of India Act provides for a special procedure by which the relaxation of the control of the Secretary of State may be brought about. The rules framed under that section require the previous approval of both Houses of Parliament. But it is clear that the relaxation contemplated under S. 19 A cannot be construed to mean abandonment or extinction. It is difficult to hold that any rules framed under S. 19 A, howsoever liberal or wide they may be, can override altogether the statutory powers of the Secretary of State (*vide* S. 131). With regard to S. 19 A, the position seems to have been cleared

by a speech of Sir Malcolm Hailey, delivered in the Legislative Assembly on 18th July, 1923. In that speech, he said that there were two processes by which advance could be achieved in the direction of waiving control. The first was the process of convention, under which the statutory control of the Secretary of State, and therefore of Parliament, still remained. The second process was by making rules under S. 19 A, and that amounted to a statutory divestment of control. Sir Malcolm held that this would be wholly inconsistent with the Constitution. For, if Parliament were to be asked to divest itself of control over any particular subject, it seemed to him that it could only do so when we had Responsible Government within the Central Government. To use his own words: "I maintain, therefore, that if we are to be correct in the maintenance of constitutional form, the Secretary of State should not divest himself of authority under S. 19 A, until we have made that change in our Constitution, as a consequence of which certain subjects can be handed over to the control of the Indian Legislature; in other words, until they are administered by Ministers." Now this interpretation of S. 19 A was challenged by some members of the Assembly, but Sir Malcolm vigorously maintained his contention. It may reasonably be assumed that he was not speaking for himself, but for the entire Government of India of which he was the Home Member, and presumably with the approval of the Secretary of State himself. This interpretation of S. 19 A has not yet been repudiated by the Government of India or by the Secretary of State, and if it still holds the field, it is obvious that any progress by

relaxation or waiving of control under S. 19 A is out of the question.

On the other hand, independently of Sir Malcolm Hailey's interpretation, let us examine S. 19 A closely, and see how far progress can be achieved by taking action under it.

The first part of the section gives power to the Secretary of State in Council to regulate and restrict by making rules the exercise of the powers of superintendence, direction and control vested in the Secretary of State or the Secretary of State in Council. This he must do to give effect to the purposes of the Government of India Act of 1919. The words "regulate and restrict" necessarily exclude the idea of divestment; in other words, howsoever he may relax his control, a certain amount of it must remain in his hands. The words, "in order to give effect to the purposes of the Government of India Act 1919," indicate a certain sense of limitation. Now, it is clear that whatever else might have been the purposes of the Government of India Act of 1919, the establishment of responsibility in the Central Government was not one. The expression "purposes" should not be confused with the distant objective of Responsible Government; for, if we study carefully the Government of India Act, we find that there is no provision there by which the Constitution of the Government of India can automatically be affected in the slightest degree. The Government of India must therefore remain responsible to Parliament until Parliament chooses to divest itself of its power to control the Government of India through the Secretary of State and to clothe the Indian Legislature with that power. Assuming, therefore, that the

Secretary of State relaxes his control, the utmost that it may lead to is a certain amount of facility in the way of the Government of India for doing certain administrative things without the previous or subsequent assent or approval of the Secretary of State. But the Government of India will, nevertheless, continue to owe responsibility to Parliament, and as Parliament constitutionally deals with subordinate Governments through Ministers of the Crown, it is obvious that the Secretary of State must continue to exercise certain functions *vis à vis* the Government of India and Parliament; thus instead of his control being direct, his influence, though indirect, will be none the less powerful. It would thus appear that any real *constitutional advance* cannot be achieved by the rule-making power under S. 19 A. On the contrary, it is more than likely that the removal of the control of the Secretary of State, unaccompanied by the substitution of control of the Indian Legislature, can only lead to a further increase of the *irresponsible* powers of the Government of India.

The second part of S. 19 A provides for rules being made for subjects other than Transferred subjects, and such rules require the approval of Parliament. In respect of the relaxation which this part and the third part of the section obviously suggest, the dominant, if not the sole, idea was to provide for the relaxation of control in regard to Provincial subjects. The third part relates to the framing of rules for such relaxation in respect of Transferred subjects, and such rules may be annulled by His Majesty in Council if an address is presented to His Majesty by either House within 30 days of the rules being laid before both Houses.

Now, apart from usage, practice or convention, the Secretary of State exercises three kinds of control—administrative, financial and legislative. So far as his administrative and financial control are concerned, really the important part of such control is exercised in regard to the existing All-India Services, or to certain high appointments, or to the Army. Is it conceivable that in regard to any one of these matters the Secretary of State can divest himself of his powers of control? Upon a superficial view of this section, it is possible to build up high hopes of advance, but when the nature and scope of it are carefully borne in mind, and when it is read along with certain specific sections of the Government of India Act relating to the All-India Services, or to certain statutory powers and duties of the Secretary of State, it becomes clear that to hope for an advance under this section is to build upon a foundation of sand.

THE INDIA COUNCIL

No account of the Secretary of State would be complete without a reference to the Council of India, " which shall consist of such number of members, not less than eight and not more than twelve, as the Secretary of State may determine" [*vide* S. 3 (1)]. The law requires that half the number of members of the Council must be persons who have served or resided in India for at least ten years, and had not last left India more than five years before the date of their appointment. The ordinary term of office of a member of the Council is five years, though, for special reasons, it may be extended (*vide* S. 3).

The right of filling any vacancy in the Council is vested in the Secretary of State, and no member can be removed except by an address from both Houses of Parliament to His Majesty.

The Council of India is required, under the direction of the Secretary of State, and subject to the provisions of the Act, to conduct the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India. The Council meets from time to time, but is bound to meet at least once a month (see S. 8), and is presided over by the Secretary of State who has also the power of vote. The Secretary of State may appoint a member as the Vice-President. The Secretary of State has the power to constitute Committees of the Council of India for the more speedy transaction of business (*vide* S. 10). Questions are discussed at meetings of the Council, and if there is a difference of opinion on any question, except a question with respect to which a majority of votes at a meeting is declared to be necessary, the decision of the Secretary of State is final. The President has a casting vote (*vide* S. 9).

The legal powers of the Council are given in greater detail in Part II, Ss. 21, 23, 25, 26, and Part III which deals with property, contracts and liabilities (*vide* Ss. 28, 29, 30, 31, 32).[1]

[1] The East India Company, as is well-known, ceased to be a trading Company in 1833, and thenceforward it held the Government of India in trust for the Crown. By Acts 21 and 22 Vict. C. 106, the East India Company was put an end to, and all the property and assets of the East India Company were vested in the Crown in trust for the Government of India.

The East India Company had a dual capacity. It exercised sovereign power and was, in addition, a trading organisation. These two functions of the East India Company must be kept distinctly apart in order to appreciate the present position of the Secretary of State. So far as its civil liability arising out of its trading capacity is concerned, the first case which dealt with it was the case of Moodaly *versus* Norton, 1785, 2 Dick, p. 652. In his

Briefly put, the Council is associated with the Secretary of State for the purposes of control and expenditure over the revenues of India (*vide* S. 21), the disposal of the securities held by, or lodged with, the Bank of England (*vide* S. 25), the disposal of any real or personal estate for the time being vested in the Crown for the purpose of the Government of India and the raising of money by way of mortgage (*vide* S. 28), the entering into contracts (*vide* S. 29) and the bringing of suits or the defending of suits (under S. 32).

This Council came into existence by virtue of the legislation of 1858. "The legal powers of the Council" suggest that it is to be regarded as in some manner the successor of the Court of Directors; but the practical *raison*

judgment, Kenyon M. R. put it as follows: "It had been said that the East India Company have a sovereign power: be it so; but they may contract in a civil capacity: and it cannot be denied that in a civil capacity they may be sued" See, as to the extent of the liability of the East India Company and *a fortiori* of the Secretary of State, the cases of P. and O. Steam Navigation Company *versus* the Secretary of State for India, 1861, 2 Bom. H. C. app. A; Seth Dunraj *versus* Hankin and the Secretary of State for India 1, N. W. P. Report 118; Nogin Chander Dey *versus* Secretary of State, I. L. R., 1 Cal. p. 11; Jehangir *versus* Secretary of State for India in Council, I. L. R., 27 Bom. p. 189. So far as its liability for its sovereign acts is concerned, the true doctrine seems to be stated in the case of Secretary of State for India in Council *versus* Haribhauji, I. L. R., 4 Mad. 344, 5 Mad. 273. That rule is as follows: "Where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power, is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the Civil Courts."

It will thus appear that the Secretary of State's legal position in relation to the subjects of the King is very much unlike the position of the Secretary of State for the Colonies. For although S. 20 of the Government of India Act vests the revenues of India in the Crown, their expenditure, both in British India and elsewhere, is subject to the control of the Secretary of State in Council, and inasmuch as the Secretary of State performs many functions and enters into contracts and liabilities in England, it has been considered necessary to constitute him into one legal entity to sue for the enforcement of rights which he may claim under those contracts, and be sued for such liabilities as he incurs in England or in India. This position would seem to be inevitable, so long as India does not get the status of a self-governing Dominion, and it is obvious that no rule-making power can affect the present position.

d'être of the Council of India is that its members provide a Parliamentary Minister, who is usually without personal knowledge of India, with experience and advice upon Indian questions. The Joint Parliamentary Committee, in their note on clause 31 of the Government of India Bill, said that they were not in favor of the abolition of the Council of India. They thought that, at any rate for some time to come, it would be actually necessary for the Secretary of State to be advised by persons of Indian experience, and they were convinced that if no such Council existed, the Secretary of State would have to form an informal one, if not a formal one. Therefore, they thought it much better to continue a body which has all the advantages behind it of tradition and authority, although they would not debar the readjustment of its work so as to make it possible to introduce what is known as the portfolio system. They suggested also that its constitution might advantageously be modified by the introduction of more Indians into it, and by shortening the period of service upon it, in order to ensure a continuous flow of fresh experience from India and to relieve Indian members from the necessity of spending so long a period as seven years in England.

It will thus be observed: (1) The period of service has been reduced in the present Act from seven to five years [Ss. 3, 4]. (2) The number of Indians has been increased to three. (3) So far as is known, the portfolio system has not yet been introduced. Indian opinion has for a long time past disfavored the continuance of this Council, as it has appeared to it a real hindrance to progress. The retired Indian officers, who are appointed to the Council, are, generally speaking, men who came out to

India in different circumstances, and whose entire training and experience disqualify them from entering into the new spirit, or adjusting themselves to the altered conditions of administration, or appreciating the new political forces which have come into operation during the last few years. As regards the Indian members, actual experience has shown that they find it extremely difficult to be in residence in England for any considerable period; and there have not been wanting occasions when not a single Indian member has been present in England.

Whatever might have been the value of so many checks on the powers of the Government of India, there seems to be hardly any sound reason for continuing them now, when there is so much demand for the liberation of the Government of India from the control of the Secretary of State and an accompanying increase of the powers of the Indian Legislature. Indian opinion therefore would not only welcome but insist on the abolition of this Council, which is either superfluous, or acts as a drag on the progress of India.

PART IV

THE GOVERNMENT OF INDIA

THE constitutional position of the Governor-General in Council is laid down in S. 33 which provides: "Subject to the provisions of this Act, and rules made thereunder, the superintendence, direction and control of the civil and military government of India is vested in the Governor-General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State."

This section may be taken as providing generally for the civil and military government of India, which is subject to certain powers delegated to the Governor-General in Council conditioned by the provisions of this Act, and subject also to the subordination to the Secretary of State. It would be interesting to compare it with the statutes governing some of the Dominions.

CANADA

S. 9 of the British North America Act 1867 (30 Vict. Ch. 3) provides as follows:

The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

S. 15: "The Command-in-Chief of the Land and Naval Militia and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen."

AUSTRALIA

S. 61 the Commonwealth of Australia Constitution Act, 1900, (63 and 64 Vict. Ch. 2) provides: "The Executive power of the Commonwealth is vested in the King and is exercisable by the Governor-General as the King's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

S. 68 provides: "The Command-in-Chief of the Naval and Military Forces of the Commonwealth is vested in the Governor-General as the King's representative."

SOUTH AFRICA

S. 8 of the South Africa Act, 1909 (9 Ed. VII) provides: "The Executive Government of the Union is vested in the King, and shall be administered by His Majesty in person, or by a Governer-General as his representative."

S. 9: "The Governor-General shall be appointed by the King and shall have and may exercise in the Union during the King's pleasure, but subject to this Act, such powers and functions of the King as His Majesty may be pleased to assign to him."

Section 17: "The Command-in-Chief of the Naval and Military Forces within the Union is vested in the King or in the Governor-General as his representative."

Now, it will be noticed from the quotations given above from the Dominion statutes that, according to the Constitution, the Crown is an integral part of the Executive Government in the Dominions. In India, while no doubt S. 1 of the Government of India Act provides "that the territories for the time being vested in His Majesty in India are governed by and in the name of His Majesty the King-Emperor of India," the Crown does not find a place in S. 33. The reason for this is obvious. India, not being a Dominion with Responsible Government, is governed by and in the name of His Majesty, but the Executive Government in India, namely, the Governor-General in Council, has only certain delegated functions of superintendence, direction and control, subject to the superior control of the Secretary of State who, in his turn, may be treated as the agent of Parliament. As is stated in paragraph 33 of the Report on Indian Constitutional Reforms: "It is open to Parliament to exercise control either by means of legislation, or by requiring its approval to rules made under delegated powers of legislation; or by controlling the revenues of India; or by exerting its very wide powers of calling the responsible Minister to account for any matter of Indian administration." Some of these things, however, Parliament does not do. The subordinate position of the Government of India is very pointedly brought out in paragraph 34 of the Report with special reference to the despatches of the Secretary of State in reply to Lord Mayo's and Lord Northbrook's

Governments in India. Howsoever annoying the speech of Lord Curzon and the incidents connected with Mr. Montagu's resignation from the Cabinet in 1922 might have been, his description of the Government of India "as a subordinate branch of the British Government 6,000 miles away," was, from the constitutional point of view, perfectly correct.

THE POSITION OF THE COMMANDER-IN-CHIEF

The second important point which needs to be noticed is that the Command-in-Chief of the Army is vested neither in the Crown nor in the Governor-General. All that S. 33 provides is that the military government of India is vested in the Governor-General in Council. The Act itself recognises the existence of, though it does not make provision for, the appointment of a Commander-in-Chief.

Before the Act of 1919, it was open to the Secretary of State in Council to appoint the Commander-in-Chief to be an extraordinary member of the Governor-General's Executive Council (*vide* S. 37, Government of India Act, 1915). The old section has been replaced by the present S. 37, which simply says that if the Commander-in-Chief is a member of the Governor-General's Executive Council, he shall have rank and precedence in the Council immediately after the Governor-General. The present Act does not expressly provide for the appointment of the Commander-in-Chief to the Governor-General's Executive Council. As a matter of policy, it may be urged that the Commander-in-Chief should cease to be a member of the Executive Council. Assuming that the Executive Council should continue, the Army Department should be in the

charge of a civilian member. Constitutionally, it is not right that even in a semi-developed Constitution like India's, the administrative head of the Army should participate in civil administration. The Esher Committee did not approve of the old system of having a military member, or even a supply member. On the other hand, they recommended the appointment of a civilian Surveyor-General of Supply. The arguments for and against the appointment of a civilian member were very well brought out in the debate on the fifteen resolutions on the Esher Committee's Report, raised by Sir Sivaswami Aiyar in the Legislative Assembly, on 28th March, 1921. Sir Sivaswami Aiyar said:

Now, upon this subject the Esher Committee's Report is singularly meagre and unconvincing. They say that there is no Responsible Government in India as in England, and that the differences of conditions between India and England do not warrant the adoption of the English system. Here I would like to point out how the question of Responsible Government affects the matter at all. Where you have a system of Responsible Government, it is necessary that you should have at the head of the Government Army administration a Minister who is responsible to Parliament; but while Responsible Government requires that the administration of the Army should be entrusted to a Minister responsible to Parliament, the absence of Responsible Government does not preclude the adoption of the same system. It does not follow that where there is no system of Responsible Government, it is wrong to entrust the ultimate control or administration of the Army to a civilian member of the Government. That is a logical distinction which it is necessary to bear in mind. In fact, in other places, the Committee has often stated that it is desirable to assimilate the system in India to that in England. Both the majority and the minority of the Esher Committee, on questions on which they have differed, have admitted the desirability of assimilating the two systems. But where they do not like to assimilate the two systems, they rely upon differences of conditions and the presence or absence of Responsible Government. Beyond the *ipse dixit* of the Esher Committee

upon this question, I find no reason which satisfies me that the absence of Responsible Government must forbid the vesting of the ultimate control of military administration in a civilian. On the other hand, it would be consistent with the approach of India to a self-governing status, and I would also refer you to a passage from the work of an eminent Constitutionalist as to the advantage of this system. I refer to Sir William Anson. At page 208, Volume 2, Part 2, this is what he says: "The mode in which the system works may now be considered, and the relations of the Secretary of State to Parliament and to the Army. His relations to Parliament are these. First, he must every year ask Parliament to legalise the Standing Army and the rules necessary for its discipline, and to vote the money required for its efficiency in all branches of the Service. And next, he must answer to Parliament, when called upon to do so, for the exercise by the Crown of its prerogative in respect of the Army. Aided by the Financial Secretary, he considers the demands framed by the military heads of the departments represented on the Council, and he must endeavor to reconcile the requirements of the Army for money with the requirements of the Treasury for economy. The presence of military members at the discussions on the questions of supply, for which the whole of the Army Council is responsible, will tend to prevent that sharp antagonism which formerly existed between the representatives of the Service and the Ministers responsible to Parliament for the cost of the Army. But in the end the estimates for the various branches of the Service must depend upon the decision of the Cabinet which, in forming its decision, is sure to keep in view the probable wishes of its majority in the House of Commons and in the country. The Treasury loves economy for its own sake; the Cabinet loves economy because economy is popular, but it is collectively responsible with the Secretary of State for the condition of the Army, and therewith for the security of the Empire. In the end, perhaps, the House thinks that the estimates are extravagant, while the Army thinks they are sufficient. But there can be no doubt that the House is more ready to grant the sums demanded when the demand is made by a civilian, after passing the criticism of the Treasury and the Cabinet, than it would be if the demand were made by a military expert who might be supposed to think no money ill-spent which was spent on his department."

Mr. Seshagiri Aiyar, who took the opposite view, expressed himself as follows:

I am not prepared to accept the suggestion that there should be a civilian as the member of the Executive Council, and that the Commander-in-Chief should be entirely outside this body. On the other hand, the better course would be to give the Commander-in-Chief, as has always been the case, a voice, a predominant voice, in matters of peace and war and in all matters relating to military policy. He is not likely to trouble the Executive Council often, and I think he would be content to come here only whenever these important questions are discussed.

Hitherto, the Commander-in-Chief has been a member of the Executive Council, responsible for peace and war and responsible for military policy. Has Sir Sivaswami Aiyar assigned sufficient reasons for initiating a departure from the existing rule? In my opinion, Sir, the reasons which he has given are not sufficient for making a departure. He has said that the organisation of the Army in India should approximate as far as possible to that in England. But is it possible to make such an approximation so long as we have a Commander-in-Chief in India? There is no Commander-in-Chief in England; there is only the Secretary of State for War at the head of the Army Department assisted by an Army Council. Here we have a Commander-in-Chief who is an experienced and superior officer; and he is assisted, I think, by an Advisory Board consisting of his subordinates. Now, let us look at the question more closely. Supposing there is to be an Army Council, who is to be the President of it, the civilian member, or the Commander-in-Chief? Supposing we say that the Commander-in-Chief is not to be a member of the Executive Council, and that a civilian member should be appointed; will the Commander-in-Chief be content to remain in the Army Council under the civilian President? It is altogether unthinkable. If that is unthinkable, if you have a civilian member in the Executive Council, and if you have a Commander-in-Chief who is head of the Army Council, there will constantly be differences of opinion and I think that this arrangement will not lead to harmony; it will lead to considerable friction between the two representatives. Under these circumstances, so long as there is a Commander-in-Chief who occupies the peculiar position he does in this country, there is no use in saying that there

should be approximation between the position of the Army in India and of the Army in England. It may be said that so far as the Council is concerned, if it is put on a statutory basis, for example, if Letters Patent are issued for the constitution of the Army, or if, by legislation in this Assembly, an Army Council is constituted with a civilian member at its head, the position would become better. I do not share in this optimism. At present the position is that the Advisory Board, which I take it would ultimately become the Army Council, consists of persons who are entirely subordinate to the Commander-in-Chief.

It is somewhat significant that the Government was silent on this point.

THE GOVERNOR-GENERAL AND THE EXECUTIVE COUNCIL

The Governor-General appoints a member of the Executive Council as Vice-President (S. 38), and the Executive Council meets at such places as he appoints. Reference has already been made to the procedure in cases of difference of opinion between the majority of the Executive Council and the Governor-General. But excepting where the Governor-General overrides the Executive Council in respect of any measure affecting the safety, tranquillity or interests of British India, he is ordinarily bound by the opinion and decision of the majority of those present, and if they are equally divided, the Governor-General, or the person presiding over the Executive Council, has a second or casting vote (*vide* S. 41). The Governor-General has been given power to make rules and orders for the more convenient transaction of business in his Executive Council. These rules are of a confidential character and are only supplied

to the members of the Executive Council and to the Secretariat.

As already pointed out, originally the Council worked together as a Board, but Lord Canning introduced the portfolio system (*vide* paragraph 38 of *The Report on Constitutional Reforms*). The result of the system is that certain departments are grouped together and placed in charge of every member. It must, however, be borne in mind that the secretaries have direct access to the Governor-General, and if a secretary so chooses, he can take any file to the Governor-General and obtain his orders without the intervention of the member. If there is a difference of opinion between the member and the Secretary, the Secretary has the right to lay the matter before the Governor-General. It is important to bear in mind the constitutional position of the Secretary. The secretary is not attached to the Member, but to the entire Government of India. And it is his duty to keep the Governor-General, who is the head of the Government, well acquainted with the progress of work and the nature of questions that are engaging the attention of the department concerned.

What is the constitutional relation between the Governor-General and his Executive Council? Is it exactly that of a Prime Minister and his colleagues? Or, is it that of a Chief of the Government and colleagues who, in actual working, are his subordinates? Or, is it a mixture of both? The answers to these questions depend not merely on the words of the statute in S. 41, because that relates only to matters which come up before the Executive Council, but also on the entire course of the conduct of business under the portfolio

system, the personal relations that prevail between the Governor-General and the members of the Executive Council, on the one hand, and between him and the Secretary of State, on the other.

The Governor-General's Executive Council differs from a Cabinet in one essential respect. In a Cabinet, ordinarily the members composing it, including the Prime Minister, belong to the same political party with a common policy and common political ideas and ideals. Even in the case of a coalition, there is a working agreement on certain matters in regard to which persons of different political parties combine to work together. Besides, in a Cabinet, though the selection of the Prime Minister rests with the Crown, the selection of the other Ministers rests with the Prime Minister. In the case of the Governor-General's Executive Council, the Governor-General may be a Conservative, one member may hold advanced views on internal politics, while another may hold views of just the opposite character. Besides, it may very well happen that the Governor-General has to deal with members in the selection and appointment of whom he has had no hand. Theoretically it is true that the responsibility of the Governor-General's Executive Council is collective, and it must act as a united whole in relation to the outside world. But in point of fact it may very frequently happen that the decision of the Governor-General in Council represents the views of only a section of it. It is true that even in a Cabinet consisting of Ministers consisting of the same political school, a spirit of compromise is necessary to ensure the success of the Cabinet. It may be assumed that the same spirit is generally prevalent in the

Executive Council of the Governor-General. But there are two essential differences. In the case of a Cabinet, there can be no question, generally speaking, of a compromise on a question of principle. Questions of compromise arise only with respect to the degree and extent of the application of a well-understood principle of the party to the circumstances of a particular case. Again, a compromise in the case of a real Cabinet may be necessitated by a consideration of the effect which a particular measure may produce on its very existence, either on the floor of Parliament or in the country at large. In the case of the Executive Council of the Governor-General, it is impossible to postulate a community of political principle or political opinion, and the compromise arrived at in the Executive Council does not necessarily imply that the principle underlying a particular measure is accepted by all the members composing the Council. It may not unoften mean that the principle underlying it is the principle only of some members, and the extent to which it has been applied is the result of a necessary compromise. Besides, where the existence of a Cabinet cannot be imperilled by an adverse vote of the Assembly or Parliament, the compromise adopted need not necessarily have any relation to the views of the Legislature. Of course, as in the case of a Cabinet, so in that of an Executive Council, it is open to a member to tender his resignation; but such a resignation has not the same political effect as that of a member of the Cabinet. Even assuming that a member of the Executive Council, on resigning his office on a question of policy, may be allowed the indulgence of explaining the reasons for taking the step to the Legislature, he has,

unlike a member of the Cabinet, no electorate to go to, for obtaining its verdict. It is conceivable that when Sir Sankaran Nair resigned on the Panjab issue, his policy, and not the policy of his colleagues, would have been endorsed by a popular House, or by his electorate, if that were possible in his case. But as it was, it was open to the Government here and to the Government in England to treat his resignation as merely indicative of the strength of his own feelings on the question. Again, we must not lose sight of the fact that the decisions of the Executive Council do not always embody the independent conclusions of the members composing it. They may be, and are, at times, influenced by the expression of the opinions of the Secretary of State.

THE GOVERNOR-GENERAL

S. 34 provides for the appointment of the Governor-General of India by warrant under the Royal Sign Manual. Since 1858, he has also been called and treated as Viceroy of India. Although the statute does not appoint a time-limit for his tenure, yet in actual practice he holds office for five years, unless the term is extended, as was done in the case of Lord Curzon.

The powers of the Governor-General are mainly derived from the statute. But there are certain powers and prerogatives which, as the representative of the Crown, he exercises. Some of these powers are laid down in his warrant of appointment which has a statutory basis (*vide* S. 34), and should be distinguished from the Instrument of Instructions. The most

important of these functions is the exercise of the Royal Prerogative to grant pardons, free or conditional, to offenders convicted by Courts of Justice. This power was expressly granted to Lord Chelmsford in the Royal Warrant appointing him, and also to Lord Reading.

The Governor-General's statutory powers are administrative, financial and legislative.

His administrative powers either relate (1) to the appointment of persons to certain offices, or (2) to the maintenance of peace and order in the country, or (3) to certain other administrative acts. He has power to appoint (*a*) the Vice-President of his Executive Council (S. 38); (*b*) Council Secretaries (S. 43 A); (*c*) Lieutenant-Governors (S. 54); (*d*) the President of the Council of State (S. 63 A. 2); (*e*) the President of the Legislative Assembly (S. 63 C. 1). Among other administrative powers which he exercises are the power (1) to call meetings of the Executive Council at such places as he may appoint (S. 39.1); (2) to override his Executive Council in respect of any measure affecting the safety, tranquillity or interests of British India where the majority of the members present at a meeting of the Council are of a different opinion; (3) to summon meetings of the Legislature; (4) prorogue the sessions (S. 63. D), and to dissolve either Chamber of the Legislature, or to extend its ordinary term (S. 63. D); and (5) after such dissolution to call for a general election.

His principal power in regard to financial matters is prescribed by S. 67 A. (2), which says that no proposal for the appropriation of any revenue or moneys for any purpose shall be made except on the recommendation of the

Governor-General. It is somewhat significant that the preceding clause speaks of the Governor-General in Council and not of the Governor-General alone. That clause is as follows: "The estimated annual expenditure and revenue of the Governor-General in Council shall be laid in the form of a statement before both Chambers of the Indian Legislature in each year." Whether this difference between the two clauses is by accident or by design, it is difficult to say; but there does not seem to be any appreciable reason why proposals for appropriation should require the recommendation of the Governor-General alone.

As regards the legislative powers of the Governor-General, they are mainly of the following description: (1) His previous sanction is necessary for the introduction, at any meeting of the Indian Legislature, of any measure affecting

(*a*) the public debt or revenues of India, or imposing any charge on the revenues of India; or

(*b*) the religion or religious rites and usages of any class of British subjects in India; or

(*c*) the discipline or maintenance of any part of His Majesty's Military (Naval or Air) Forces; or

(*d*) the relations of the Government with foreign princes or States;

or any measure

(i) regulating any Provincial subject, or any part of a Provincial subject, which has not been declared by rules under this Act to be subject to legislation by the Indian Legislature, or

(ii) repealing or amending any Act of a Local Legislature; or

(iii) repealing or amending any Act or Ordinance made by the Governor-General [S. 67 (2)].

He has the power to certify, when either Chamber of the Indian Legislature refuses leave to introduce, or fails to pass in a form recommended by him, any Bill, that the passage of the Bill is essential for the safety, tranquillity or interests of British India, or any part thereof (S. 67 B). It was under this section that the Princes' Protection Bill was certified by the Governor-General in 1922 and the Finance Bill raising the salt duty in 1923.

He exercises his veto over Bills passed by the Indian Legislature under S. 68.

He can promulgate Ordinances for the peace and good government of India for a space of not more than six months (S. 72).

His previous sanction is necessary to the making or taking into consideration by a Local Legislature of a certain class of Bills which are specified by S. 80 A 3. He exercises his veto with regard to Bills passed by a Local Legislature under S. 81.

When a Bill passed by a Local Legislature is reserved by the Governor for the consideration of the Governor-General, he may, within six months, either give assent to that Bill, or withhold assent (*vide* S. 81 A).

He may also reserve any Bill passed by a Local Legislature for the signification of His Majesty's pleasure.

It will be noticed that, excepting the power of veto, and probably also the power exercised in regard to reserved Bills, the other powers of the Governor-General are much wider than those exercised in a Dominion by the Governor-General who is bound to follow the advice of his Ministers. On the contrary, in India, the Governor-General has the power, in certain circumstances, of overriding his Executive Council. There are

historical as well as other reasons for this. To quote from the Report on Indian Constitutional Reforms:

> Originally, the Council of the Governor-General worked together as a Board, and decided all questions by a majority vote. The difficulties which Warren Hastings encountered from this arrangement are notorious. Lord Cornwallis insisted on being given enlarged powers, and to meet his views the provision which now enables the Governor-General to override his Council and to act on his own responsibility in matters of grave importance was inserted. The power has rarely been exercised, though Lord Lytton used it in 1879 to abolish partially the import duty on English cotton goods.

The vesting of some of the powers mentioned above in the Governor-General exclusively—for instance, the power of stopping legislation of certain kinds such as mentioned in S. 67—is clearly due to the fact that by reason of his eminent position as the first servant of the Crown in India, he is the best person qualified to carry out the policy of religious neutrality. Similarly, it may be held that there are certain other reasons of State for such exclusive power in regard to the public debt or public revenues or the military forces or questions of foreign policy. The changes effected in the system of government in the Provinces also account for his special powers under S. 80 A with regard to Provincial legislation.

In any system of Responsible Government all these powers, excepting the power of veto, will have to go.

THE GOVERNOR-GENERAL IN COUNCIL

The members of the Governor-General's Executive Council are also appointed by His Majesty by warrant. There is no number fixed, but it is open to the Crown to prescribe the number of members, which can presumably

be done on the constitutional advice of his Ministers. Three at least of the members must be persons who have been for at least ten years in the service of the Crown in India. This is a most important provision, and unless it is changed or modified by an Act of Parliament, it would be impossible to convert the present Council into a body of Responsible Ministers. Not only does it give a security to the servants of the Crown in India in that it provides for their substantial representation in the Executive Council, but it also seeks, in a pre-eminent degree, to provide for the representation of the point of view of the permanent services in India. It must be borne in mind that it does not say that these three must be members of the Indian Civil Service; all that it does state is that they should have put in ten years' service under the Crown in India. Service under the Crown in England will not count at all for the purpose of eligibility under this clause. In actual practice, in the vast majority of cases, these appointments go to the members of the Indian Civil Service, inasmuch as they bring with them the special experience and knowledge of administration which may be taken to be the main reason for this provision. In addition to three such members of the Council, there must be one who is a barrister of England or Ireland, or an advocate of Scotland or a pleader of a High Court in India of not less than ten years' standing. The disqualification of pleaders to hold this appointment was removed by the Act of 1919. The lawyer member has always been in charge of the legal portfolio, though he need not be, according to the letter of the law.

If any member of the Council other than the Commander-in-Chief is, at the time of the appointment, in the

military service of the Crown, he shall not, during his continuance in office as such member, hold any military command, or be employed in actual military duties.

An important clause was added by the Act of 1919 by which "provision may be made by rules under this Act as to the qualifications to be required in respect to the members of the Governor-General's Executive Council in any case where such provision is not made by the foregoing clauses of this section". It is quite clear that this new clause can apply only to members other than those who have served the Crown for ten years in India and to the Law Member. What exactly is the meaning of the word "qualifications" in this clause? The same word has been used with reference to electors and candidates seeking election to the Council of State or the Legislative Assembly in S. 64 (1). It is not difficult to understand the meaning of this word in this section in regard to election matters. It is a word of well-understood meaning (*vide* Stroud's *Judicial Dictionary,* 2nd Ed. p. 1243). But having regard to the context of S. 36, it does not seem to be fair to interpret this word in a sense more or less similar to that in which it has been used in the other section. For instance, would it be constitutional to lay down a rule that one of the necessary qualifications under this clause to an appointment to a membership of the Executive Council should be the possession of 3,000 acres of land, or payment of land revenue or incometax to the extent of Rs. 50,000? Even if such a rule could be legal, it would do violence to the spirit of the Constitution, as it would deprive the State and the tax-payer of the services of many persons of proved ability and character who might otherwise be eligible.

It is open to very serious doubt as to whether a rule could be framed under this clause prescribing the number of Indians. The whole structure of the Government of India Act is inconsistent with the prescribing of any racial or religious qualification for the holding of any office. It has been suggested that it is legally possible under this clause to make a rule prescribing that a certain number of members of the Executive Council shall be appointed from amongst the elected members of the Legislature. The report of the Joint Parliamentary Committee does not throw any light on the meaning to be attached to this word "qualifications". But assuming that such a rule would be valid, it is open to some serious objections. If some members of the Executive Council are appointed from among the elected members of the Legislature, they cannot be responsible to the Legislature, as that would be inconsistent with the entire Constitution of the Government of India. They must be responsible to the Crown. The Executive Council should act as a single unit in relation to the Legislature. There cannot be such a thing as divided responsibility in the case of a Cabinet. The position of the members selected from the Legislature will be extremely onerous, for though constitutionally they may not owe responsibility to the Legislature, yet they will always be overborne by the consciousness that they owe their appointment to the Executive Council to the circumstance that they were members of the Legislature. This is likely to lead to friction between them and their colleagues in the Government. On the other hand, if and when they support the views of their colleagues which may be in conflict with those views of the

Legislature, they are sure to antagonise the Legislature and lose their influence. The suggestion under consideration is not, and cannot possibly be treated as, an advance towards responsibility. It is not even a half-way house between responsibility and irresponsibility; it is impossible to conceive how members so appointed can, in popular estimation, be treated as responsible when their functions are not divided off from the rest. In the case of the Provincial Ministers, there is no doubt about their constitutional responsibility for the subjects under their control. But even this extent of responsibility will be wanting in the case of members of the Executive Council appointed in accordance with rules which may be framed under clause 5 of S. 36. The last and the most serious objection to a certain number of members of the Executive Council being appointed from among the elected members is that it will tend to lower the standards of public life by presenting a temptation to office.

As regards the personal relations between the Governor-General and the members of the Executive Council, making allowance for the personal equation of both, and assuming that there is a readiness on both sides to understand each other's point of view and meet it as far as possible, the great political patronage which the Governor-General enjoys should not be lost sight of even in the case of such high dignitaries. There is a considerable body of opinion which has in the past disfavored, and still disfavors, the appointment of members of the Executive Council to Governorships. Under the statute itself, the Governors of the United Provinces, the Panjab, Bihar and Orissa, the Central

Provinces and Assam are appointed after consultation with the Governor-General. On principle, it is not right and proper that the preferment of members of the Executive Council should depend upon the recommendation of the Governor-General.

THE GOVERNOR-GENERAL AND THE SECRETARY OF STATE

As regards the relations of the Governor-General to the Secretary of State, it has not unoften happened that the two have belonged absolutely to two different parties in England. Lord Chelmsford, a Unionist, served under Mr. Montagu. Lord Reading, a Liberal, served under Mr. Montagu, a Liberal, Lord Peel, a Conservative, Lord Olivier, a Laborite and Lord Birkenhead, a Conservative. Dealing with this subject generally in the Report on Indian Constitutional Reforms, Mr. Montagu and Lord Chelmsford expressed themselves as follows:

> The relations between Simla and Whitehall vary also with the personal equation. If resentment has been felt in India that there has been a tendency on occasion to treat Viceroys of India as "agents" of the British Government, it is fair to add that there have been periods when Viceroys have almost regarded Secretaries of State as the convenient mouth-piece of their policy in Parliament. Certainly there have been times when the power of the Government of India rested actually far less upon the support of the Cabinet and Parliament than on the respect which its reputation for efficiency inspired. The hands of the Government of India were strong; and there was little disposition to question the quality of their work, so long as it was concerned chiefly with material things, and the subtler springs of action which lie in the mental development of a people were not aroused.

The question of the relations of the Governor-General to the Secretary of State may be said to have assumed importance so far back as the time of Lord Northbrook and of Lord Salisbury. Lord Salisbury carried on a large amount of private correspondence with Lord Northbrook and was disposed to treat the Governor-General more or less as the Secretary of State for Foreign Affairs treats an Ambassador. On the other hand, Lord Northbrook's view was that Parliament having conferred certain specific powers on the Governor-General, he could not be treated by the Secretary of State on the footing of an Ambassador. Again, Mr. Montagu, in the course of a speech, described the relations between the Viceroy and the Secretary of State as "intimate," and spoke of Lord Morley, and his Council as working through the *agency* of Lord Minto, thereby suggesting that the Viceroy's position was that of an agent. This view of the agency of the Viceroy, or of the power of the mandate of the Secretary of State, has been challenged in certain quarters. On the other hand, the full implication of the theory of "the man on the spot" requires to be appreciated. The advocates of that theory in the olden days were of the opinion that the Governor-General, being directly cognisant of the situation in India, and having an intimate appreciation of the nature of the issues which arise from day to day in the governance of a big country like India, should not be dictated to, or interfered with frequently, by the Secretary of State. It was then customary in this country to turn from the man on the spot, who was supposed to share local prejudices and generally to be opposed to political progress, to the Secretary of State who was

supposed to live in a free atmosphere, and to be, on the whole, more progressive. In actual fact, however, it would be impossible to maintain that all Secretaries of State have been progressive and all Governors-General reactionary. Sir Valentine Chirol has strongly contested the theory of the agency on the ground that the Governor-General is the direct and personal representative of the King-Emperor, and that with his Council he forms, in regard to administrative matters, a corporate body.

Lord Morley, in an article in *The Nineteenth Century and After*, said that he was not prepared to accept this criticism, and was distinctly inclined to the view that the Governor-General was really subordinate to the Secretary of State. He relied on the proclamation of 1858, in which Queen Victoria directed the Governor-General, " in Her name and on Her behalf to be subject to such orders and regulations, as he shall from time to time receive through one of Her principal Secretaries of State ". He also relied on the terms of the warrant of appointment and upon the statute of 1858. Leaving aside the political aspect of the question, and confining oneself to the strictly constitutional point of view, it is somewhat difficult to challenge the position of Lord Morley. As has already been pointed out, the Governor-General is also the Viceroy, but the two positions are absolutely distinct. Indeed, the statute does not at all speak of him as Viceroy. In his administrative capacity, he is only the Governor-General. The fact that he is also the Viceroy does not make him any the less amenable to the control of the Secretary of State as Governor-General. Under S. 33, he is required to pay due obedience to all orders of

the Secretary of State. This being so, to claim for him a higher position than that of an agent is to shut one's eyes to the realities of the situation. The fact that in conjunction with his Council he forms a corporate body does not make him any the freer of the control of the Secretary of State. For that corporate body itself must receive its orders from the Secretary of State.

The control of the Secretary of State is open and insidious, visible and invisible. The system of private correspondence between the two has not received any substantial check or control since it received encouragement at the hands of Lord Salisbury in the seventies of the last century. The outside world knows little of the amount or the nature of that correspondence. Only Lord Morley has permitted the public to have some idea of that correspondence by publishing his letters to Lord Minto. Pointed attention was drawn to it by the Mesopotamia Commission which adverted to the circumstance that in the statute " no mention whatever is made of private communications, nor is authority given either to the Secretary of State or the Governor-General to substitute private telegrams for the prescribed methods of communication laid down by the statute . . . It is usually the practice of the Secretary of State and the Governor-General to take away their private telegrams at the close of their tenure of office . . . There is, therefore, no public record of the purport of the vast majority of these private communications. The substitution of private for pubic telegrams in recent years has apparently so developed as to become almost the regular channel of official inter-communication." The Secretary of State is not bound to take the advice of his Council

with regard to what are known as secret communications, which are limited to certain subjects. He may send "urgent communications" on his own authority, but with regard to them he has got to explain the causes for his so acting to his Council. What is, however, more remarkable than this is that these communications which the Governor-General receives from the Secretary of State and the replies he sends, are not ordinarily available to the members of his Council, though he may show them to all or to any of the members. It would thus appear that the relation of the Secretary of State to the Governor-General is one of special confidence which is not shared by the members of the Governor-General's Council. Considering the heterogeneous composition of the Executive Council, there is little room for surprise if the Governor-General should observe a special degree of caution in the disclosure of these confidential communications to the members of his Council.

The above considerations only tend to establish the following conclusions:

(1) The control of the Secretary of State over the Governor-General and over the Governor-General in Council is of a very real and living character. (2) The relations between the Secretary of State and the Governor-General are of a specially confidential nature and not altogether consistent with the unity which characterises a Cabinet form of Government. (3) The methods of control open to the Secretary of State are many and not always easily understood by the outside world.

It is true that on occasions some Governors-General have asserted their independence. Lord Hardinge's

speeches on the Indian position in South Africa and on the rejection, by the House of Lords, of the proposal to create an Executive Council for the United Provinces may be cited as recent examples. Another and more recent instance is the resolution moved at the Imperial Conference held in 1923 for the appointment of the Colonies Committee, consisting of representatives appointed independently of the Secretary of State by the Governor-General in Council. It is conceivable, however, that if the Secretary of State had taken his stand on his right to have a determining voice in the appointment of those representatives, the Government of India could not have constitutionally resisted that claim.

Stress has been laid above on the fact that an examination of the constitutional position leads to the conclusion that the Secretary of State is, in a pre-eminent degree, supreme, and that the Government of India and the Governor-General, notwithstanding their specific statutory rights and duties, are in a much more dependent and subordinate position than would seem to be the case upon a superficial examination. Now, whatever might have been the justification at one time, the present position of the Government of India is extremely anomalous. It has now got to deal with a Legislative Assembly with an overwhelmingly large majority of non-official and elected members. The Government of India is represented in that Assembly usually by three or four of their members and a certain number of secretaries. It is true that there are certain subjects on which the Assembly cannot move resolutions or interpellate the Government. It is equally true that, in regard to the Budget, certain subjects, such as

defence, salaries and pensions of the Imperial Services, are not open to discussion by either Chamber and are not submitted to the vote of the Legislative Assembly; nor are they open to discussion by either Chamber at the time when the annual statement is under consideration, unless the Governor-General otherwise directs (*vide* S. 67 A). But making allowance for all these protected subjects, the area open to the Assembly is large enough to make the position of the Government of India at times extremely difficult. Indeed, if there is need for taxation, and a Finance Bill is introduced, the Assembly may reject it altogether, leaving it to the Viceroy to certify that Bill. This is actually what happened in March, 1924. Now, the present position is wholly incompatible with the existence of proper relations between the Government of India and the Assembly. Even during the first three years of the Reforms, actual experience showed that the Government of India, apart from sustaining defeats on certain important questions, found itself compelled to adopt compromises which conceivably it would not have accepted, if it was a Responsible Government. Again, the Government of India cannot possibly speak on certain important questions without reference to the Secretary of State, whatever may be its convictions thereon. And this must necessarily bring it at times into acute conflict with the Legislative Assembly. The whole theory of the subordination of the Government of India to the Secretary of State and Parliament was consistent with the state of things which prevailed when the Legislative Councils were merely advisory bodies and contained clear official majorities. That position, so far as the Legislatures are concerned, has

been changed, and the obvious incongruity between the present position of the Assembly and an irresponsible and irremovable Executive is in the nature of a constitutional anomaly not free from dangers to the smooth working of the administration and the growth and development of healthy relations between the Legislature and the Executive. To maintain the control of the Secretary of State under the present circumstances must appreciably affect the prestige of the Government of India, the respect that it should command, and its utility in the eyes of the Legislature and the general public. To take away the control of the Secretary of State can only lead to an increase in the irresponsibility and autocracy of the Government of India and, as a result, to collisions between it and the Legislature, which are bound seriously to affect the working of the machinery.

PART V

THE INDIAN LEGISLATURE

THE first fact to note about the Indian Legislature is that it is bi-cameral, consisting of a Council of State and a Legislative Assembly. Ordinarily speaking, no Bill can be deemed to have been passed unless it has been agreed to by both Chambers, either without amendment or with such amendments only as may be agreed to by both Chambers. The maximum number of members for the Council of State is sixty. It consists partly of nominated and partly of elected members. The number of official members cannot exceed twenty. As at present constituted, it consists of 34 elected, 6 nominated non-officials and 20 officials. The Legislative Assembly consists partly of elected and partly of nominated members. The total number of members as provided by the section is 140, of whom non-elected members are 40; and out of the latter, 26 are official members, leaving the number of elected members at 100. In point of fact, under the rules framed, there can be 103 elected members and 41 nominated members, of whom 26 are officials, and one a person nominated as the result of an election held in Berar. But power is reserved under the Act to increase the

number of members in the Assembly and to vary the proportion which the classes of members bear one to another, subject to the condition that at least five-sevenths of the members of the Assembly shall be elected members and at least one-third of the other members shall be non-officials.

The Governor-General is not a member of the Assembly or of the Council of State, but he has the right to summon, address and to prorogue a session.

Each of the two Houses has a President; in this respect, however, the statute makes a difference between the two Houses. In the case of the Assembly, it is provided that "there shall be a President of the Legislative Assembly who shall, until the expiration of four years from the first meeting thereof, be a person appointed by the Governor-General, and shall thereafter be a member of the Assembly elected by the Assembly *and approved by the Governor-General*". What is to happen if the elected President is not approved by the Governor-General? On this question the statute is silent. It is conceivable that this may lead to friction. The Deputy President of the Assembly has from the very beginning been elected from among the members of the Assembly. His appointment too is subject to the approval of the Governor-General. All the appointments are salaried appointments; the President of the Council of State gets a fixed salary, whereas the elected President and Deputy President of the Assembly get the salaries determined by the House.

In the case of the Council of State, the statute provides that "the Governor-General shall have power to appoint from among members of the Council of State

a President and other persons to preside in such circumstances as he may direct". There is no provision for an elected President in the future. The last two Presidents have been officials, and though under the statute, there is nothing to prevent the Governor-General from appointing a non-official, yet it is a point for consideration as to what the constitutional position of the non-official member of the Council of State would be if he is so appointed by the Governor-General. If he owes his appointment to the Governor-General and not to the Council of State, it is fair to suggest that upon his appointment he becomes an official, and he must vacate his seat in the Council (*vide* S. 63 E). If he vacates his seat in the Council, it is at least open to doubt whether he can continue to be in the Council as President. Having regard to this difficulty, it may be safe to assume that what was intended by the statute was that the President of the Council should be an official member; and this will probably be the case in future.

The ordinary term prescribed for the Council of State is five years, and for the Legislative Assembly three years. The Governor-General, however, has the power to dissolve either Chamber at any time before the expiry of its term. This power of dissolution is a recognised constitutional power which is exercised in self-governing countries like England and the Dominions under well-understood conditions. The responsibility for that step generally rests with the Prime Minister, but in the Indian statute the discretion is vested absolutely in the Governor-General.

The Governor-General has also the power to extend the term of either Chamber, if in special circumstances

he thinks it fit. There, again, the discretion is his, and he is not responsible to either House for taking that step.

After the dissolution of either Chamber, the Governor-General is bound to appoint a date, not more than six months, or with the sanction of the Secretary of State, not more than nine months, after the date of dissolution for the next session of that Chamber. This provision, as also the provision relating to dissolution, is similar to the provisions applicable to local Councils under S. 72 B. In Madras, in connection with the Hindu Religious Endowments Bill, difficulty arose as to the interpretation of the words, " next session of the Council ". Opinion was sharply divided. The legal advisers of the Madras Government seemed to have interpreted these words to imply, on the analogy of a Corporation, that notwithstanding a dissolution, the new Council was really a continued session of the old. This opinion was strongly dissented from by other lawyers in the country. Without dogmatising on the soundness of either opinion, it may be said that this is a case for the removal of doubt.

Officials are not qualified for election to either Chamber, and a non-official member of either Chamber loses his seat on his accepting office in the service of the Crown. A person cannot be a member of both Chambers. If he is elected to both, he must specify to which Chamber he desires to belong. The statute also provides that every member of the Governor-General's Executive Council shall be nominated as a member of one Chamber of the Indian Legislature. But without being a member of the other Chamber, he has the right of addressing it. S. 64 provides for the framing of rules for the term of office of nominated members, the

conditions under which they may be nominated, the qualifications of electors, the constitution of constituencies, the number of members to be elected by communal and other electorates, the qualifications of candidates and the decision of election disputes. It also provides that any ruler or subject of any State in India may be nominated as a member of either Chamber. The proviso to Rule 5 runs as follows:

> Provided that, if a ruler of a State in India, or any subject of such a State, is not ineligible for election to the Legislative Council of a Province, such ruler or subject shall not by reason of not being a British subject, be ineligible for election to the Legislative Assemby or Council of State, by any constituency in that Province and [no subject of such a State shall for that reason be ineligible for election by the Delhi constituency].

A number of rules with regard to the franchise and matters relating to election have been framed.

Reference may be made here to some of the important provisions. Women are now eligible for election in one or two Provinces. The demand has already been put forward on their behalf, and educated public opinion in its favor may be said to be growing. In certain Provinces, such as the U. P., the Panjab, and to some extent in Bihar and Bengal, one cannot hope in the near future to get an appreciable number of women to stand for election, though it is hoped that better results may be expected in this respect in Bombay, and Madras. If a person has been convicted by a criminal court of an offence involving a sentence of transportation or imprisonment for a period of more than six months, then, in the absence of pardon, he is not eligible for election for five years from the date of

expiration of the sentence. Similar disabilities attach to persons who are found guilty of corrupt practices at the elections.

Those who are not British subjects, or who are females (except in Provinces where the sex disqualification has been removed), or are lunatics so found, and persons under 21 years of age are disqualified from being put on the electoral roll of a constituency. The age limit, however, prescribed for candidates is 25 (*vide* Rule 5). The franchise is based on (1) community, (2) residence, and (3) (*a*) occupation or ownership of a building (*b*) assessment to, or payment of, Municipal or Cantonment rates or taxes or local cesses, or (4) the holding of land or membership of a local body. This applies to general constituencies. For a special constituency, special qualifications are required, and they are set out in detail in Schedule II attached to the rules. There is provision also made for the decision of election disputes. Election cases relating to the Indian Legislature in India are disposed of by Commissioners appointed by the Governor-General. They must be persons eligible to be appointed Judges of the High Court within the meaning of S. 101 (3) of the Government of India Act. In England, the Act of 1868 made over these election cases to the Court of Common Pleas and now the jurisdiction is exercised by the High Court of Justice. Experience has shown that the number of such cases is by no means small, and it is not always easy to secure, among private practising lawyers or District Judges qualified to become Judges of the High Court, an extensive knowledge of the law relating to elections. The jurisdiction of the High Court has apparently been excluded on

administrative grounds. They are already, it is said, overworked, and this addition to their jurisdiction will put a heavy strain on them. The subject, however, is of such vital importance to the growth of representative institutions that it seems desirable that in the infancy of the law such cases should be tried by Judges of the High Court.

The rules also provide for an oath of allegiance being taken by the members of the Legislatures upon their assuming office.

POWERS OF THE INDIAN LEGISLATURE

The powers of the Indian Legislature are defined in S. 65, clauses (a) to (*f*). It cannot, however, without being expressly authorised by an Act of Parliament, make any law repealing or affecting any Act of Parliament passed after 1860, or any Act of Parliament enabling the Secretary of State to raise money in the United Kingdom for India; nor can it make any law affecting the authority of Parliament, or any laws affecting the written Constitution of Great Britain whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or the dominion of the Crown over any part of British India. Nor has the Indian Legislature power, without the previous approval of the Secretary of State in Council, to make any law empowering any Court other than a High Court to pass a sentence of death on any of His Majesty's subjects born in Europe or the children of such subjects, or abolishing any High Court.

It will be noticed that the limitations imposed on the powers of the Indian Legislature make it difficult to hold

that it is supreme in the same sense in which the Dominion Legislatures are. As the Secretary of State in Council has, in a special measure, control over the Indian finances, he alone can raise a loan in England; and the Indian Legislature is debarred from passing any law or repealing or affecting any Act of Parliament which gives the Secretary of State in Council the power to raise such loans. It is obvious that if the present powers of the Secretary of State are transferred to the Government of India, and it is authorised to operate in the English market, this limitation will have to go. The portion of the section imposing a limitation on the power of the Legislature to pass any law affecting the written laws or the Constitution of Great Britain, on which depends the allegiance of the subject to the Crown, has in recent years come in for judicial discussion in several cases. In Mrs. Besant's case (L. R., 46 I. A., 176-191), the point was raised before the Privy Council that under this clause the Indian Press Act was *ultra vires.* The Privy Council did not sustain this argument. Similarly unsuccessful attempts have been made to challenge the validity of certain portions of the Indian Defence Act. Ordinance No. 4, passed by the Governor-General as an emergency measure during the Martial Law administration in the Panjab, was directly challenged before the Privy Council as being *ultra vires*, inasmuch as Special Martial Law Courts were established under that Ordinance, and it was contended that that tended to affect the allegiance of the subject to the Crown. The Privy Council said: "The sub-section does not prevent the Indian Government from passing a law which may modify or affect a rule of the Constitution, or of the common law upon the observance

of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the Crown, as by a transfer or qualification of the allegiance or modification of the obligations thereby imposed." (See Bugga *vs.* King-Emperor, 47 I. A., 128-138). Coming now to the affirmative part of the section which specifies the powers of the Indian Legislature, there are important judicial pronouncements which must be borne in mind. In the case of Empress *vs.* Burah (3 Appeal Cases: 889 S.C. I.L.R., 4 Cal., pp. 172), the Privy Council stated the law to be as follows:

> The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large and of the same nature as Parliament itself. The established Court, when a question arises as to when the prescribed limits have been exceeded, must of necessity determine that question, and the only way in which it can properly do so is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions.

Compare with this the following statement in Moore's *Commonwealth of Australia*, p. 285:

> The Colonial Legislatures are bodies with plenary powers, possessing a general and undefined power of government in their territory over all persons and things therein, and

this power extends to the creation of such executive and judicial machinery as well as such subordinate legislative authorities as appear necessary to the Colonial Legislatures.

Reference also may be made to the judgment in Secretary of State *vs.* Moment, 40 I. A., p. 48, in which Lord Haldane discussed the effect of S. 65 of the Act of 1858, and held that the effect of it was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a civil Court in any case in which he could have similarly sued the East India Company. The scope of the decision has sometimes been taken to be larger than is justified by the facts. But its importance here is that it affords another illustration of the limitations imposed on the powers of the Indian Legislature. It will be noticed that under S. 65 (1) A, the Indian Legislature has power to make laws for all persons, for all Courts and for all places and things within British India. Dealing with S. 22 of the Act of 1861, which was in substance the same as S. 65, it was recently held in the case of Keyes *vs.* Keyes, in opposition to the views of Prof. Dicey expressed in his *Conflict of Laws*, that the words of the section could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown domiciled in India. The laws to be made are to be of local operation. The status of a citizen domiciled elsewhere is not a condition having local effect in India or local limitations. This was a case in which an Englishman domiciled in England, brought a suit in the Panjab High Court praying for the dissolution of his marriage on the ground of the adultery of his wife, the marriage and the adultery both having taken

place in India. The Indian Court gave a decree of dissolution. Subsequently, the husband presented a divorce petition in the English Court on the same facts. The Divorce Court in England held that the Indian decree was not of any authority. This decision, if correct, imposes a further limitation on the powers of the Indian Legislature. It was not followed, however, by the Panjab High Court in the full Bench decision in Lee *vs.* Lee (*vide* I. L. R., 5, Lahore, p. 147). Sir Shadi Lal, C. J., said that he was not prepared to accept the dictum in Keyes *vs.* Keyes that the Indian Legislature was not competent to found jurisdiction in divorce on residence and that the statute laying down the rule is *pro tanto ultra vires.* On the other hand, Macleod, C. J., and Marten, J., in Bombay agreed with the decision in the English Court, though Crump, J., differed from them (See Wilkinson and Wilkinson, I. L. R., 47 Bom., p. 843).

The Imperial Parliament had to pass a statute in 1921 (11 and 12 Geo. 5, Ch. 18), by which it validated the divorces granted by Indian Courts prior to the passing of the statute. It will thus appear that though the decision in Keyes and Keyes affects mainly European British subjects, it does substantially detract from the affirmative powers of the Indian Legislature specified in S. 65 (1) A.

It may be useful here to compare the powers of our Legislature with those of the Dominion Legislatures. The legislative authority of the Parliament of Canada and that of the Provincial Legislatures are set out in Ss. 91 and 92 respectively of the British North America Act. It will be observed that under the Canadian Constitution, certain classes of subjects are mentioned in

S. 91 as being within the legislative domain of Parliament. Similarly, certain other classes of subjects are mentioned in S. 92 as being within the exclusive jurisdiction of the Provincial Legislatures for the purposes of legislation. At the same time, S. 91 of the British North America Act reserves to the Parliament of Canada very large residuary powers. The Indian Act appears to follow the Canadian model in this respect with the necessary variations in regard to the classes of subjects. The Commonwealth of Australia Constitution Act (1900, 63, 64, Vict.) classifies in detail the subjects with regard to which it can legislate, the residuary powers vesting with the States. The South Africa Act of 1909 provides that "Parliament (the Parliament of the Union) shall have full power to make laws for the peace, order and good government of the Union".

The Canadian Constitution has formed the subject of judicial interpretation by the Privy Council in a large number of cases. One of the most important of them is the case popularly known "The Liquor Prohibition Case" (reported in 1896, A. C., p. 348). The Privy Council held that "the general power of legislation conferred upon the Dominion Parliament by S. 91 of the British North America Act, 1865, in supplement to its enumerated powers must be strictly confined to such matters as are unquestionably of National interest and importance, and must not trench on any of the subjects enumerated in S. 92 as within the scope of Provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion". (See also 1902 A. C., p. 73). This principle of interpretation of the relative functions of the Central and

Provincial Legislatures may be postulated as being more or less true of the actual relations which in practice prevail in India, though in recent years there have been some notable departures from it. As an illustration, a reference may be made to the Musalman Waqf Act of 1923 which, coming under the head of religious endowments, was essentially a matter for Provincial Legislatures and not the Supreme Legislature. Dealing with such matters, Moore, in his *Constitution of the Commonwealth of Australia*, says on p. 285: "It may be expected that in the Commonwealth the Courts will be guided by the analogy of the vesting of the general residuary power in the Parliament of Canada, and the power over matters 'of a local or private nature' in the Legislatures of the Provinces, with this difference only, that the broader powers of State Parliaments in Australia will narrow the field open to the local legislation of the Commonwealth Parliament."

No measure affecting (*a*) the public debt or revenues of India; or (*b*) the religion, religious rites or usages of any class of British subjects in India; or (*c*) the discipline or maintenance of any part of His Majesty's Military, Naval or Air Forces; or (*d*) the relations of the Government with foreign princes or States; or (*e*) any Provincial subject which has been declared by rules to be subject to legislation by the Indian Legislature; or (*f*) any Act of a Local Legislature; or (*g*) any Act or Ordinance made by the Governor-General, can be introduced at any meeting of either Chamber, without the previous sanction of the Governor-General [*vide* S. 67 (21)].

Under S. 67 (3), the Governor-General has the power to refer any Bill which has been passed by one Chamber,

but not passed by the other Chamber within six months of the passage of the Bill in the former, for decision to a joint sitting of both Chambers. Standing orders may be made under this section for providing for meetings of members of both the Chambers to discuss the points of difference. The Governor-General has, further power to return a Bill for reconsideration by either Chamber.

THE BUDGET

The Governor-General's powers in regard to the Budget call for special notice. The annual estimates of expenditure are laid before both Chambers of the Indian Legislature in the form of a statement. But no proposals of expenditure of any revenue or moneys for any purpose can be made except on the recommendation of the Governor-General [*vide* S. 67 A (1) and (2)]. This seems to be inevitable in the absence of Responsible Government. Such proposals, if there were Responsible Government, would be made at the instance of the Cabinet. There are, however, certain heads of expenditure which cannot be submitted to the vote of the Legislative Assembly, nor can they be discussed by either Chamber at the time when the annual statement is under consideration, unless the Governor-General otherwise directs. In case of any doubt, the Governor-General has the final authority to decide whether any proposal relates to any of the protected heads. The proposals are usually made in the form of demands for grants. The Assembly may assent or refuse assent to any demand, or reduce its amount. If any demand is refused altogether, or the

amount of such demand is refused, the Governor-General *in Council* may restore it, provided he is satisfied that it is essential to the discharge of his responsibility. In point of fact, some such demands have been restored, while others have not been. Lastly, the Governor-General has the power, in cases of emergency, to authorise such expenditure as may, in his opinion, be necessary for the safety or tranquillity of British India or any part thereof.

Considerable discussion has taken place in the Assembly and outside as to the protected heads. So far as the salaries and pensions are concerned, they can be protected by appointments being made with the approval of His Majesty or the Secretary of State in Council. The word "salary" has a very elastic meaning; ordinarily, the salaries are fixed by the Executive Government and, in any case, the salaries of the superior services have been fixed independently of the concurrence of the Legislature. The increases given as a result of the Islington Commission were with the consent or the approval of the Legislature. And although the Government of India declared that it would allow the Legislature to discuss the recommendations of the Lee Commission, yet the resolutions of the Assembly are not binding on the Government. It is, therefore, obvious that a very large head of expenditure is free from the control of the Legislature. It would be quite a different thing if the Legislature were a party to legislation prescribing the salaries and giving guarantees of security to the services. Similarly, under the head "Political and Defence," the expenditure incurred on the Army and the Foreign Departments is protected. The Governor-General has, however, allowed

the Legislature to discuss the Army Budget. But it is not put to the vote of the Assembly. Two questions arise: (i) Has the Governor-General the power to remove the embargo? (2) Is it desirable that he should do so? As regards the first question, the answer to it depends upon the construction of clause 3 of S. 67 A. The Law Officers of the Crown in England, it was stated in the Assembly, were of the opinion that the Governor-General had no power to remove the embargo, as the words, "unless the Governor-General otherwise directs," did not control, according to them, the first half of clause 3 of S. 67 A. They were probably influenced by the punctuation, as also by considerations of public policy underlying the principle of protection embodied in the section. On the other hand, it is understood that other lawyers have taken a different view and, in their opinion, the words "unless the Governor-General otherwise directs," control both parts of clause 3. If it were merely a question of construction of a statute, perhaps a good deal could be said against the opinion of the Law Officers of the Crown in England. But the real question is one of policy. So far as the Army is concerned, it is a huge and a delicate machinery which, it is held, should be protected from inexperienced hands. An adverse vote of the Assembly, it is argued, may paralyse the Government and affect the *morale* and efficiency of the Army and imperil the safety of the country. At the same time, it is argued that a mere discussion of the Army Budget leads to no substantial results, and that the Assembly, chafing under a sense of limitation of its powers, can never deal with the problems of Defence

with a proper sense of responsibility. Whatever may be the value of the two arguments, it is certain that the present position is likely to lead in the future more frequently to deadlocks, such as the one which arose over the Budget of 1924 when the Finance Bill was thrown out by the Assembly, and which can only be solved by a resort to the power of certification. It has, therefore, been suggested in certain quarters that the Army should be reserved to the control of the Governor-General, and that so far as supply is concerned, a minimum item of expenditure for the Army, revisable after a certain period, should be laid down as a charge on the revenues, so that it may automatically be forthcoming. This would obviate the necessity of the power of certification and remove a recurring cause of friction. The details of this proposal can only be examined by a competent Committee. If the necessity of the situation calls for a larger sum of money, the Assembly should be asked to vote on it. Should an unforeseen emergency, imperilling the safety or tranquillity of British India, require any special expenditure, power should be reserved to the Governor-General, as is now the case, to authorise such expenditure.

POWER OF CERTIFICATION

The power of certification of Bills has been conferred upon the Governor-General by two sections, S. 67 A and S. 67 B. Under the former, where in either Chamber of the Legislature a Bill has been introduced or proposed to be introduced, or any amendent to it is moved or proposed to be moved, the Governor-General

may certify that the Bill, or any clause of it, or the amendment, affects the safety or tranquillity of British India, and stop all further proceedings in regard to it. Under this section, he exercises by certification a preventive power. It will, however, be noticed that this is strictly limited to the safety or tranquillity of British India. S. 67 B gives him a positive or affirmative power; that is to say, where either Chamber of the Legislature has refused leave to introduce, or has failed to pass, in a form recommended by the Governor-General, any Bill, he can certify that the Bill is essential for the safety, tranquillity or interests of British India. The word "interests" has a very vague interpretation. The provision relating to the salt tax in the Finance Bill in 1923 and the Princes Protection Bill in 1922 were certified under this section, and the constitutionality of the action of the Governor-General has been challenged both in India and in England. When the Government of India Bill was under discussion in Parliament, Mr. Montagu said in the course of the debate, with reference to criticism of the word "interests": "It is not any measure which affects the interests; it is a measure which the Viceroy can say is essential. He does not now, as he used to, pass that legislation by means of what used to be the official *bloc*. He passes it frankly as an executive order of his Government." Similarly, reference may be made to the Report of the Joint Parliamentary Committee on clause 26 of the amending Bill of 1919, in which, however, no reference is made to the word "interests". In paragraph 279 of the Montagu-Chelmsford Report, the power of certification suggested was with reference to "the interests of peace, order or good government".

The fact is that the word "interests," standing as it does in that section, has far too wide an interpretation. And in the event of this power of certification remaining on the statute-book as an indispensable safeguard against a perverse attitude of the Legislature, it seems necessary that the original intention expressed in paragraph 279 of the Montagu-Chelmsford Report should be carried out. Considering that the Government of India is irresponsible, the word "interests" in this section could enable the Governor-General to certify any Bill which he thought was essential to the interests of India in regard to any department of governmental activity. Such a large measure of the power of certification, though consistent with the present Constitution of the Government of India, is altogether incompatible, even in the present stage of transition, with the progress of the Legislature towards Responsible Government. The section provides rather a complicated procedure in sub-clauses (*a*) and (*b*) of clause (1). Rules have been framed in accordance with it, giving the Governor-General power to recommend a Bill at any stage without certifying it at the very beginning. The object of these apparently was to provide for negotiation with the Legislature between the stage of recommendation and that of certification, for after certification there can be no negotiation, and the Bill must be passed as certified. It is somewhat curious that under sub-clauses (*a*) and (*b*), the Bill becomes an Act of the Indian Legislature. In point of fact, this is fiction of the worst possible description. The Legislature has no voice or vote after certification, and the Governor-General is not a member of the Legislature. If a certified Bill is to become a part of the statute-book, it should

profess to be what in truth it is, namely, an Act passed by the Governor-General. Under clause 2 of S. 67 B, every such Act is expressly made by the Governor-General—which is perfectly true; but this is inconsistent with the Bill becoming an Act of the Indian Legislature. Clause 2 of the section provides that such an Act shall be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent. But it shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days after that House has sat. When it has received the assent of His Majesty in Council, and such assent has been notified by the Governor-General, the Act has the same force and effect as an Act passed by the Indian Legislature.

PART VI

LOCAL GOVERNMENTS

THE expression "Local Government" means, in the case of a Governor's Province, the Governor in Gouncil, or the Governor acting with his Ministers (as the case may require), and in the case of a Province other than a Governor's Province, a Lieutenant-Governor in Gouncil, Lieutenant-Governor or Chief Commissioner (*vide* S. 134).

S. 46 provides that the Presidencies of Fort William in Bengal, Fort S. George and Bombay, and the Provinces known as the United Provinces, the Panjab, Bihar and Orissa, the Central Provinces and Assam shall each be governed by a Governor in Council, and in relation to Transferred subjects (save as otherwise provided by this Act), by the Governor acting with Ministers appointed under this Act.

These Presidencies and Provinces are known as Governors' Provinces, to distinguish them from Provinces which are governed by Chief Commissioners, *e.g.*, Delhi, Ajmer-Merwara, Coorg, N.-W. F. Province and Baluchistan. The Presidency Governors and the Governors of the other Provinces are alike appointed by the Crown;

with this difference only, that in the case of the latter, the Governor-General is consulted. In point of fact, the Governors of the Presidencies cost the tax-payer much more than those of the other Provinces.

The maximum annual salary of the Governors of Bengal, Madras, Bombay and the United Provinces is Rs. 1,28,000; but the personal staff of the Governors of Bengal, Madras and Bombay is much larger than that of the last named. They have a Military Secretary, a Surgeon, a Private Secretary, and a larger number of A. D. C.'s. The Governors of the U.P., the Panjab, Bihar and Orissa, the C. P. and Assam have no Military Secretary, no Surgeon attached to their staff, and they have a smaller number of A. D. C.'s. The maximum annual salary of the Governor of the Panjab and of Bihar and Orissa is Rs. 1,00,000, of the C. P. Rs. 72,000 and of Assam, Rs. 66,000.

CONSTITUTIONAL POSITION OF THE PROVINCIAL EXECUTIVE

The outstanding feature of the Provincial Governments is that they are divided now into two halves. Under S. 45 A (1) d, certain subjects have been, in accordance with rules made under the Act, transferred to the administration of the Governor acting with Ministers appointed under this Act, and revenues or moneys for the purpose of such administration are also allocated.

The transferred subjects, therefore, are administered by Ministers and the reserved subjects by members of the Executive Council. The members of the Executive

Council are appointed under S. 47 by the Crown. The maximum number prescribed is four, but it is for the Secretary of State in Council to prescribe the precise number for any Executive Council. One at least of the members of the Executive Council must be a person who, at the time of his appointment, has been for at least twelve years in the service of the Crown in India. This provision has the effect of reserving at least one appointment for the members of the Indian Civil Service. Clause 3 of S. 47 may be compared with clause 5 of S. 36. It lays down that provision may be made by rules as to the qualifications to be required in respect of members of the Executive Council of the Governor of a Province in any case where such provision has not been made by the foregoing provisions of this section. The same remarks apply to this clause as to clause 5 of S. 36.

One result of the present system has been that Executive Governments in the Provinces have become top-heavy. For instance, in Bengal, Bombay and Madras, there are four members of the Executive Council, two of them belonging to the Indian Civil Service and two taken from non-official public life. In the U.P., the Panjab, Bihar and Orissa, the C.P. and Assam, there are two members in each Council. In Bihar, the number of members of the Executive Council was originally three, but it has been reduced to two. The members of the Executive Council have to administer only the reserved subjects. Their salaries are prescribed by the second Schedule; in Bengal, Madras, Bombay and the U.P., the maximum annual salary prescribed is Rs. 64,000; in the Panjab and Bihar and Orissa, it is Rs. 60,000; in the C.P., it is Rs. 48,000; in Assam, it

is Rs. 40,000. It is true that even before this Act came into force, Bombay, Madras and Bengal had Executive Councils, but the number of members was smaller, and they were responsible for the administration of all subjects. Leaving aside the increase in the cost of the Secretariat and the staff, the increase in the number of members of the Executive Council alone means so much more expenditure. It is sometimes urged that the democratic form of Government is more expensive. But that seems to be hardly a proper explanation ; the real fact of the matter seems to be that it was considered necessary that with the introduction of non-official Indians into the Government, there should be a counterpoise provided by an increase in the number of European members.

S. 52 vests the power of appointing Ministers in the Governor. He may appoint a Minister who is not an elected member of the Local Legislature, but such a Minister cannot hold office for a longer period than six months without becoming an elected member of the Local Legislature. The effect of this is that the Ministers must be members of the Local Legislature. Being members of the Local Legislature, they must depend upon its support, or the support of the majority and hold themselves responsible to it. The provisions of this section may be compared with Ss. 62 and 64 of the Commonwealth of Australia Constitution Act, 1900; Ss. 12 and 14 of the South Africa Act, 1909 ; S. 11 of the British North America Act, 1865. It will be observed that both the Australian and South African Acts provide for the establishment of Executive Councils and the members of those Executive Councils are the King's Ministers in those Dominions. Similarly, in Canada

the members of the Council, styled the King's Privy Council for Canada, perform the functions of Ministers. In India, however, there is a distinction made between the Executive Council and the Ministers. The Executive Council has a corporate existence of its own, and in its dealings with the outside world must act on the principle of collective responsibility. In the case of Ministers, they are not spoken of as constituting a Council or a Ministry, with the result that the element of collective responsibility in their dealings with the Governor or with the outside world is wanting. Each Minister counts for a single unit, and it is also not necessary that a decision of the reserved half of the Government should be the result of joint deliberation with all the Ministers. Nor is it necessary that all the Ministers should belong to the same political party. In actual practice, it cannot be said that everywhere Ministers have belonged to the same political party. The present unsatisfactory position in this respect can, to a certain extent, be explained by the fact that political parties are still in a state of vagueness. So far as collective responsibility is concerned, attempts have been made in certain Provinces by some Ministers to create conventions for themselves. But they have not always succeeded, and so far as is known to the outside world, in many Provinces Governors have dealt with the Ministers individually.

Salaries of Ministers

With regard to the question of the salaries of Ministers, the Act provides as follows: "There may be paid to any Minister so appointed in any Province the same salary

as is payable to a member of the Executive Council in that Province, unless a smaller salary is provided by a vote of the Legislative Council of the Province." S. 66 of the Australia Act provides £ 12,000 a year for all the Ministers out of the consolidated revenue fund of the Commonwealth, "until the Parliament otherwise provides". The South Africa Act makes no such provision, and does not create a charge on the consolidated revenue fund for the salary of the Ministers. The British North America Act provides for the creation of a consolidated revenue fund and for a charge on it in respect of the salary of the Governor-General, but is silent in respect of the salary of Ministers.

Coming back to S. 52 of the Government of India Act, it is clear that the idea of Parliament was that ordinarily, in respect of salaries, Ministers should stand on the same footing as members of the Executive Council. This was in part due to the desire expressed at that time that the status of Ministers should not be lower than that of members of the Executive Council. On the other hand, it was felt that the Ministers being responsible to the Legislatures, the latter should have a voice in determining their salaries. It was probably out of deference to this feeling that the words, "unless a smaller salary is provided by vote of the Legislative Council of the Province," were introduced. Thus this clause in S. 52 appears to be in the nature of a compromise between two different views. But the words just quoted have given rise to considerable difficulty in the interpretation of the section. In the Central Provinces, the Legislature reduced the salary of the Ministers to Rs. 2. In Bengal, the entire demand in respect of

the salary of the Ministers was refused. Taking an extreme view of the law, it is difficult to hold that either of the two Councils exceeded the limits of its legal powers. On the other hand, taking a broad view, it does not seem to be quite consistent with constitutional practice to reject the entire demand for such grants. The usual practice of expressing dissatisfaction with a particular Minister is to move for the reduction of his salary by £ 100, and if such a motion is carried, the Minister goes out of office. The natural meaning of the clause under consideration would seem to be that if a particular Council is of the opinion that a Minister should get something less than a member of the Executive Council, it is open to it to reduce the salary ; and such a motion, if carried, need not necessarily amount to a vote of censure. Indeed, this has been done in some Provinces purely as a financial measure, and Ministers have continued to hold office on reduced salaries. The legitimate exercise of power under this clause must be distinguished from a reduction in the salary of a Minister, which is intended to be of the nature of a censure on him or on the Government. In the Central Provinces, the majority distinctly said that the reduction which they were effecting in the salary of Ministers was not a personal reflection upon them, but a mark of their dissatisfaction with the system of Diarchy. Both in Bengal and in the Central Provinces, the resolutions carried were part of a programme of obstruction, but there can be no doubt as to the result. It is difficult to hold that a demand for a supplementary grant for the Ministers' salaries, to which the Council had refused its assent, was consistent with the spirit

of S. 72 D, or that it was a legitimate exercise of the right to put forward a demand for a supplementary grant within the meaning of Rule 94 in the Bengal Council. It is true that the result of this may be the success of obstructive tactics, but taking the statute itself into consideration, there seems to be hardly anything in it to meet a situation of this character. It is clear that the Governor did not feel himself justified in acting under proviso b to S. 72 D, and it is difficult to see how he could have authorised any expenditure on the salary of the Ministers as being in his opinion necessary for the safety or the tranquillity of the Province, or for the carrying on of any department.

Ordinarily, the Governor is bound by the advice of his Ministers in relation to transferred subjects, but he can for sufficient cause overrule them. It is clear that if the Ministers are overruled on a question of principle or importance, the only thing that they can do is to resign.

In relation to his Executive Council the Governor is bound by the opinion and decision of the members present, and if they are equally divided, he has a casting vote. But in regard to measures affecting the safety, tranquillity or interests of his Province or any part thereof, he can override his Council.

JOINT DELIBERATION

It will be noticed that in the Act itself there is no provision for joint deliberation between the two halves of the Government. The Joint Parliamentary Committee, however, laid considerable stress on the desirability of fostering a habit of joint deliberation in regard to "a

large category of business of the character which would naturally be the subject of Cabinet consultation ". In regard to this category, said the Committee, the habit should be carefully fostered of joint deliberation between the members of the Executive Council and the Ministers, sitting under the chairmanship of the Governor. There cannot be too much mutual advice and consultation on such subjects, but the Committee attached the highest importance to the principle that when once opinions have been freely exchanged and the last word has been said, there ought to be then no doubt whatever as to where the responsibility for the decision lies. Therefore, in the opinion of the Committee, after such consultation, when it is clear that the decision should lie within the jurisdiction of one or the other half of the Government, that decision in respect of a reserved subject should be recorded separately by the Executive Council, and in respect of a transferred subject, by the Ministers, and all acts and proceedings of the Government should state in definite terms on whom the responsibility for the decision rests. The Committee visualised to themselves the Governor acting as an informal arbitrator between the two halves of the Government. They considered that it would be the duty of the Governor to see that a decision arrived at on one side of his Government was followed by such consequential action on the other side as might be necessary to make the policy effective and homogeneous. Lastly, they laid down that in the debates of the Legislative Council, members of the Executive Council should act together and Ministers should act together, but members of the Executive Council and Ministers should not oppose each other by speech or vote. Members of the

Executive Council should not be required to support, either by speech or vote, proposals of Ministers of which they do not approve, nor should Ministers be required to support by speech or vote proposals of the Executive Council of which they do not approve; they should be free to speak and vote for each other's proposals when they were in agreement with them.

Mr. Montagu, in his speech on 5th June, 1919, supporting the motion for the second reading of the Government of India Bill in Parliament, put the position more briefly as follows:

> If reserved subjects are to become transferred subjects one day, it is absolutely essential that during the transitional period, although there is no direct responsibility for them, there should be opportunities of influence and consultation. Therefore, although it seems necessary to separate the responsibility, there ought to be every room that you can possibly have for consultation and joint deliberation on the same policy, and for acting together for the purposes of consultation and deliberation, as the Bill provides, in one Government.

Now, it may be asked, how far has this principle of joint deliberation been carried out in practice in the various Provincial Governments in India? It is difficult to speak with any degree of certainty about this matter, as the internal proceedings of the Government are not open to the public gaze. There have, however, been complaints heard in various quarters that, excepting, perhaps, in Madras, the principle of joint deliberation has not been followed by most of the Provincial Governments, and by some it was followed only for a limited time. More than one Minister in Madras has said in his public speeches that Lord Willingdon treated his entire

Government as a unified Government. The observation has been made that Diarchy succeeded in Madras because it was ignored. The two principal arguments in support of the system of Diarchy were: First, that in regard to certain subjects, that is to say, transferred subjects, Ministers would have direct responsibility to the Legislature fixed on them; and secondly, they would have opportunities of influencing the other half of the Government in regard to the reserved subjects. It does not seem to have been the case that opportunities of influencing the reserved half of the Government have generally been afforded to the Ministers everywhere. As regards their responsibility to the Legislatures and the administration of the subjects under their control, some interesting questions arise:

(1) Have they been generally supported by non-official members of the Councils?

(2) Have they been able to develop the services under their control?

(3) Have they carried on any programme of educating the electorates?

So far as the general support of the Councils is concerned, notwithstanding the fact that during the first three years of the Reforms the party system as represented in the Councils left much to be desired, the Ministers, speaking generally, appear to have received a sufficient amount of support nearly everywhere. In Madras, the Ministry had a majority of their own to fall back upon, and was invariably supported. In Bihar and the C. P., too, the Ministers generally succeeded in receiving the support of the Councils. In the United Provinces, the position was somewhat peculiar, and such opposition as the Ministers encountered was from the Zamindars. But

the Liberal section of the Council was generally loyal to the Ministers. It was, however, said in official quarters that the Ministry would have been thrown out of office on the District Boards Bill but for the support and influence of the official half of the Government. In Bengal and Bombay, the task of the Ministry does not appear to have been so easy. It is impossible to go into those local conditions with any degree of minuteness or precision. But there are two facts which must be borne in mind in this connection: (1) In the first Councils everywhere the members belonged either to the Liberal Party or to the landed classes, or were Independents. There were no Swarâjists. The Opposition was weak, and altogether the parties on either side were not well organised. (2) In some Provinces, the Ministers were attacked because they were held to be responsible in certain quarters for the policy which was adopted by the reserved half of the Government for the maintenance of law and order. In order to appreciate the full force of criticism of this character, it is necessary to sift the facts, but unfortunately those facts are not known to the public, and can only be given authoritatively by the Ministers and the official members of the Government.

To answer the second question would again require a very detailed examination of the facts relating to each department under the control of the Ministers, and also a comparative statement of the conditions of those departments before and after the Ministers took charge of them. It would also be necessary to find out how far the Ministers were supported by the Governors when they differed from their Secretaries, or important officers of the Government. In order to form a correct judgment

on this question, it would perhaps be necessary to examine the Ministers themselves and their official colleagues. The data for such examination are not wholly available. But some idea of the nature of the resolutions moved in the Councils and of the character of the debates can be formed from a perusal of the volume published by the National Conference in 1923, *The Work of the Indian Legislatures.*

As regards the education of the electorates, in some Provinces the Ministers have, during their terms, addressed a number of meetings and explained their policy. It has generally been the case in Madras, Bombay and the Panjab. In the U.P., Mr. Chintamani was most active, and although it is true that the educative work should have been carried on more actively, yet it can not be said that everywhere it has been neglected. In many Provinces some at least of the elected members have also gone to their constituencies and addressed meetings.

The spheres of functions of the Local and the Central Governments are defined by rules made under S. 45 A. Under the same section, rules have been framed known as the Devolution Rules which also provide for the transfer of subjects to popular control. The revocation or suspension or transfer of any subjects cannot be brought about except with the sanction of the Secretary of State in Council (*vide* proviso to Rule 45). In regard to the transferred subjects, the power of superintendence, direction and control, which is vested in the Government of India, can be exercised only for such purposes as may be specified in rules made under this Act. But the Governor-General in Council "is the sole judge as to

whether the purpose of the exercise of such powers in any particular case comes under the purposes so specified". The most important rule on the subject is Rule 49 of the Devolution Rules:

> The powers of superintendence, direction and control over the Local Government of a Governor's Province vested in the Governor-General in Council under the Act shall, in relation to transferred subjects, be exercised only for the following purposes, namely:
>
> (1) To safeguard the administration of Central subjects. (2) To decide questions arising between two Provinces, in cases where the Provinces concerned fail to arrive at an agreement. (3) To safeguard the due exercise and performance of any powers and duties possessed by, or imposed on, the Governor-General in Council under, or in connection with, or for the purposes of, the following provisions of the Act, namely, S. 29 A, S. 39 (1A), Part VII A, or of any rules made by, or with the sanctión of, the Secretary of State.

Here again it would be necessary to investigate facts as to how far in actual practice the limits of this Rule 49 have been exceeded, if at all. There is reason to believe that dissatisfaction has been felt with the manner in which this rule has been worked in relation to certain matters.

Provision is also made in this chapter for the appointment of non-official Council Secretaries. How far the experiment has been tried or has succeeded is another matter calling for enquiry. It seems that the experiment was quite successful in Madras, and Council Secretaries were found to be of great service to the Ministers. On the other hand, in the United Provinces, Council Secretaries were appointed for a short period, after which they resigned their offices. Official opinion in the United Provinces is understood to have been dissatisfied with the results.

This chapter provides also for the constitution of new Provinces and the appointment of Deputy Governors to be appointed by the Governor-General and the declaration of territories "as backward tracts," and the application of this Act to such territories as may be.

The Power of Veto

S. 68 gives the Governor-General the power to exercise his power of veto in respect of a Bill. He may also reserve it for the signification of His Majesty's pleasure thereon, in which case it does not become an Act until the assent of His Majesty in Council has been signified to and notified by the Governor-General. S. 69 requires that every Act of the Indian Legislature is to be sent by the Governor-General to the Secretary of State, and the power of His Majesty in Council to signify his disallowance of any such Act is reserved. This power of veto in the Indian Act may be compared with the power of veto in some of the Dominion Acts. By S. 59 of the Commonwealth of Australia Constitution Act of 1900, and S. 65 of the Union of South Africa Act of 1909, the Crown has the power of disallowing any law within one year of the Governor-General's assent. S. 58 of the Australia Act gives the Governor-General the power to reserve a law for the Crown's pleasure, and S. 60 provides that a law so reserved shall not have force unless and until within two years from the day on which it was presented to the Governor-General for the King's assent, the Governor-General makes known by speech or message to each of the Houses of Parliament or by proclamation that it has received the King's assent (*vide*

S. 66 of the South Africa Act which specifies only one year).

The Australia Act (S. 58) gives the Governor-General power to return to the originating House any Bill with his recommendations. This power of return is a kind of moral persuasion constitutionally exercised. And it is obvious that it is very different from the power of certification provided in the Indian Act. Such power of return is provided in the case of Local Legislatures (*vide* S. 81A).

This power of veto vested in the Crown should not be treated as a mere constitutional symbol of the supremacy of the Crown, but as a power of great value enabling the Crown to protect Imperial interests. In Australia, it has assumed "unexpected importance as a means of preventing either State or Commonwealth from embarrassing the activity of the other" (*vide* Moore's *Australian Constitution*, p. 91). In India, however, having regard to the entire relations of the Central and Provincial Governments as embodied in the Act, it seems hardly likely that the veto will assume, or can assume, the same importance as between the Central Government and a Local Government (*vide* Webb *versus* Outtrim, 1907, A.C. p. 81).

The Governor-General in Council has got certain legislative functions to discharge in regard to certain Provinces by passing regulations for the peace and good government upon a requisition made by their Local Governments (*vide* S. 71).

By S. 72 the Governor-General alone has, in cases of emergency, the power of making and promulgating Ordinances for the peace and good government of British India

or any part thereof. Such Ordinances cannot remain in force for more than six months. This power is subject to the same restrictions as the power of the Indian Legislature to make laws, and "any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or suspended by any such Act". In ordinary practice, Ordinances made under this section are, as soon as possible, reported to the Secretary of State, and it seems to be the practice that ordinarily no resort is had to this power when the Legislature is sitting. This power was very much used during the Panjab troubles and the rising of the Moplahs. The last few words, "and may be controlled or suspended by any such Act," would seem to indicate the superior power of the Indian Legislature; but considering the extensive powers of the Governor-General which come into operation before and after the introduction of a Bill, it seems hardly likely that in the event of a conflict between the Legislature and the Governor-General in respect of an Ordinance, the former could in fact establish its supremacy.

PART VII

LOCAL LEGISLATURES

IN every Governor's Province, there is a Legislative Council. The Governor is not a member of that Council, but the members of the Executive Council are, though he may summon a Council and address it. The numerical strength of the Legislative Councils varies in the different Provinces. Bengal leads with the number of 125; Madras and the U. P. each have 118 members; Bombay has 111, Bihar and Orissa has 98, the Panjab 83, the C. P. 70, and Assam 53 members. The statute provides that there cannot be more than 20 per cent official members in a Council, and at least 70 per cent must be elected. Officials are not eligible for election, but Ministers are not officials for the purposes of S. 80 B. Rules may be made for increasing the number of members of any Council subject to the maintenance of the above proportion. The Governor has the right of nominating a certain number of members; and for the purpose of any Bill, in the case of Assam, one person, and in the case of other Provinces, not more than two persons, being experts, may be nominated in addition to the numbers in the Council given above. In Berar, the election of members takes place, though technically they are nominated

members of the Legislative Council of the C. P. The Act provides for rules being made as to (*a*) the term of nominated members and the manner of filling vacancies; (*b*) the conditions under which nominations may be made; (*c*) the qualification of electors, the constitution of constituencies, the method of election, including the number of members elected by communal and other electorates; (*d*) the qualifications for being nominated or elected; (*e*) the settlement of election disputes and the manner of enforcing these rules.

Power may be delegated to the Local Governments for making subsidiary regulations affecting these matters.

In point of fact, a large number of rules and regulations have been framed in regard to these matters. The qualifications for eligibility for election are practically the same as in the case of the Assembly. Similar is the case with regard to eligibility for inclusion in the electoral roll.

Constituencies are divided into general constituencies and special constituencies such as those of Landholders, Universities, Commerce and Industry. The former include Muhammadan and European constituencies. The qualifications for electors for general constituencies are not altogether uniform everywhere, though, the principles underlying such qualifications are broadly speaking, more or less similar; with this difference, that the standards vary between urban and rural constituencies in each Province. It is not, however, necessary to go minutely into these rules.

The general feeling is that the numerical strength of the Councils everywhere requires to be increased. This will necessarily involve an extension of the franchise,

but the extent to which it may be brought about will vary from Province to Province, having regard to local conditions.

The normal length of term of a Legislative Council is three years (*vide* S. 72 B). In regard to dissolution before the expiry of its term, and the summoning of the next Council or its adjournment, the powers are similar to those of the Governor-General in relation to the Indian Legislature (*vide* S. 63). The only difference is that the period of a Governor's Council cannot be extended for more than one year [*vide* S. 72 B (*b*)]. In the case of the Indian Legislature, there is no such limitation with regard to the period by the Governor-General (*vide* S. 63 D). The first Presidents of the Provincial Councils were appointed by the Governors. On the expiry of four years, the office became elective, subject to the approval of the Governor. The Deputy President's office has been elective from the very beginning.

The procedure for laying the estimated annual expenditure and revenue of the Province before the Council is similar to that in the Legislative Assembly. The Councils have the same power of assenting to or refusing assent to a demand, or reducing the amount thereof as is possessed by the Assembly. This power is, however, subject to certain important provisos. In the case of a demand relating to a reserved subject, the Governor has the power of overruling the decision of the Council if he certifies that the expenditure provided for in the demand is essential to the discharge of his responsibility for the subject. It is under this power that in several Provinces certain demands for grants

in relation to reserved subjects have been restored by Governors. It should be noticed that this power is limited to reserved subjects.

In cases of emergency the Governor has the power of authorising such expenditure as may, in his opinion, be necessary for the safety or tranquillity of the Province, *or for the carrying on of any departments*. Except for the italicised words, this power is similar to that of the Governor-General under S. 67 A (8). But it is precisely these italicised words which are the source of trouble. Could a Governor authorise expenditure in regard to a transferred subject which had been disallowed by the Council, but which he considered necessary for the carrying on of any department? In Bengal, Lord Lytton refused to restore demands in regard to the educational and medical heads in the Budget. The procedure adopted seems to be perfectly constitutional and quite consonant with the spirit of the Act; but the words quoted above are so wide and unqualified that, upon a strict legal interpretation, another course might have been taken. Proposals for appropriation in the Local Councils can only be made on the recommendation of the Governor.

There are certain subjects which are protected from the vote of the Councils and even discussion by them. They are: (1) Provincial contributions to the Central Government, (2) interest and sinking fund charges on loans, (3) expenditure of which the amount is prescribed by or under any law, (4) salaries and pensions of persons appointed by or with the approval of His Majesty, or by the Secretary of State in Council, and (5) salaries of the Judges of the High Court of the Province and of the

Advocate-General. As regards (4), the same remarks apply to this clause as to S. 67 A 3 (ii). As regards (5), it should be noticed that Judges of the High Court and the Advocate-General are appointed by Letters Patent issued by the Crown.

POWER OF CERTIFICATION OF THE GOVERNOR

The Governor has got the same preventive power of certification in regard to Bills under S. 72 D (5) affecting the safety or tranquillity of his Province as the Governor-General has under S. 72 A in regard to Bills affecting the safety or tranquillity of British India or any part thereof. Under S. 72 E, the Governor has got the power of certifying Bills affirmatively. This power can be exercised only if the Council has refused leave to introduce, or has failed to pass in a form recommended by the Governor, any Bill relating to a reserved subject, if he certifies that the passage of the Bill is essential for the discharge of his responsibility for the subject. On such certificate being given and on signature by the Governor, the Bill as originally introduced becomes an Act of the Local Legislature. It will be noticed that this power is much more limited than the power of the Governor-General under S. 67 B. The words, "essential for the discharge of his responsibility," in regard to reserved subjects, are far more limited and more definite than the expression "interests" in S. 67 B.

An Act so passed is required to be sent forthwith to the Governor-General who reserves it for the signification of His Majesty's pleasure. Upon the signification of such assent by His Majesty in Council and notification

thereof by the Governor-General, the Act has the same force as an Act passed by the Local Legislature. The Governor-General has, in cases of emergency, the power of giving his assent to such an Act without reserving it for the assent of the Crown, though in such a case too the Crown may subsequently disallow it. A certified Act must be laid on the table of each House of Parliament for not less than eight days on which that House has sat before it can be presented for His Majesty's assent.

It is obvious that in regard to transferred subjects this power of certification does not exist; and to that extent, subject to the right of the veto, it may be said that the Local Councils enjoy a measure of responsibility. Ss. 73, 76, 78, 80 deal with Legislative Councils of Lieutenant-Governors and Chief Commissioners. It is not necessary to examine the provisions of these sections at length, for, in the first place, there are no Provinces governed by Lieutenant-Governors, and, in the next place, the Councils contemplated by these sections are very different in their composition and the scope of their powers. In Coorg, which is administered by a Chief Commissioner, a Legislative Council, mainly of an advisory character, has been established. The proposal for the establishment of such a Council in the N.-W.F. Province has not yet materialised.

POWERS OF LOCAL LEGISLATURES

The powers of a Local Legislature are specified in S. 80 A. It can make laws for the peace and good government of the territories for the time being constituting that Province. It can, subject to certain

conditions, repeal or alter in that Province any law made before or after the commencement of the Government of India Act by any authority in British India other than that Local Legislature. It has not, however, the power to make any law affecting an Act of Parliament. The real limitations on its powers are those indicated by clause 3 which provides that it cannot, without the previous sanction of the Governor-General, make or take into consideration any law affecting certain subjects.

"The Local Legislature of any Province may not—without the previous sanction of the Governor-General, make or take into consideration any law:

(*a*) Imposing or authorising the imposition of any new tax, unless the tax is a tax scheduled as exempted from this provision by rules made under this Act; or (*b*) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the Government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty; or (*c*) affecting the discipline or maintenance of any part of His Majesty's Naval, Military or Air Forces" [*Vide* S. 80 A (3)].

This division of legislative powers between the Central and Local Legislatures is not by any means very scientific. One can understand a Local Legislature having no power to pass a law affecting the discipline or maintenance of the Army, or the foreign relations of the Government, but the limitation with regard to Central subjects or laws protected by rules from interference by a Local Legislature under clauses (*h*) and (*i*) narrow down the legislative scope of the Councils. The previous sanction of the Governor-General, though a personal privilege of the Governor-General, is in practice given or

withheld upon the advice of the Legislative Department; and very often at some stage or other it has a great deal to say about it. The Local Councils are thus, in the matter of previous sanction, subordinated to an "irresponsible" Executive authority. This check on the power of initiative, which is further reinforced by the Reservation of Bills Rules, seems hardly consistent with the smoothness of relations that should prevail between the Central and Local Governments.[1]

In this respect, reference may be made to Ss. 91 and 92 of the British North America Act. S. 91 specifies twenty-nine subjects as falling within the legislative jurisdiction of the Parliament of Canada. But it also reserves residuary powers to it. S. 92 specifies sixteen subjects as falling within the exclusive jurisdiction of Provincial Legislatures.

[1] Where a Bill is reserved for the consideration of the Governor-General, the following provisions shall apply:

(*a*) The Governor, Lieutenant-Governor, or Chief Commissioner may at any time within six months from the date of the reservation of the Bill, with the consent of the Governor-General, return the Bill for further consideration by the Council with a recommendation that the Council shall consider amendments therefor.

(*b*) After any Bill as returned has been further considered by the Council, together with any recommendations made by the Governor, Lieutenant-Governor or Chief Commissioner relating thereto, the Bill, if reaffirmed with or without amendment, may be again presented to the Governor, Lieutenant-Governor or Chief Commissioner.

(*c*) Any Bill reserved for the consideration of the Governor-General shall, if assented to by the Governor-General within a period of six months from the date of such reservation, become law on due publication of such assent, in the same way as a Bill assented to by the Governor, Lieutenant-Governor, or Chief Commissioner, but if not assented to by the Governor-General within such period of six months, shall lapse and be of no effect, unless, before the expiration of that period, either

(i) the Bill has been returned by the Governor, Lieutenant-Governor, or Chief Commissioner for further consideration by the Council; or

(ii) in the case of the Council not being in session, a notification has been published of an intention so to return the Bill at the next session. *Vide* S. 81 A (2).

S. 91 of the British North America Act provides:

Powers of the Parliament: It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and Good Government of *Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of *Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:

1. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

3. The Raising of Money by any Mode or System of Taxation.

4. The Borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Light-houses and *Sable Island.*

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea-coast and Inland Fisheries.

13. Ferries between a Province and any *British* or Foreign Country or between two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. *Indians* and Lands Reserved for the *Indians.*
25. Naturalisation and Aliens.
26. Marriage and Divorce.
27. The Criminal Law except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter, coming within any of the Classes of Subjects enumerated in this Section, shall not be deemed to come within the Class of Matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

S. 92 provides :

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated ; that is to say :

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The Borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Officers and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes :

(*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province or extending beyond the Limits of the Province.

(*b*) Lines of Steam Ships between the Province and any *British* or Foreign Country.

(*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of *Canada* to be for the general Advantage of *Canada*, or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnisation of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely Local and private Nature in the Province.

Necessarily, the classification of subjects cannot be the same in India as in Canada. But it is suggested that the same model may be followed, and this power of previous sanction of the Governor-General, which is a relic of the old days of centralisation and the imposition of checks upon the powers of Local Governments and Local Legislatures, should be done away with. There would not seem to be any great risk in following this course when it is remembered that there is always the power of veto available to the Governor-General and to the Crown.

There is a further limitation placed by S. 80 C, under which no member of any Local Council can introduce, without the previous sanction of the Governor, any measure affecting the public revenues of a Province or imposing any charge on those revenues. For instance, if a member wants to introduce a Bill providing a statutory limitation of increase in the land revenue, or a Bill bringing under any closer limitation by statute the process of revising land revenue assessments, he cannot do so without the previous sanction of the Governor which, in the circumstances existing, may not be very easy to secure. The Joint Select Committee thought " that the imposition of new burdens should be gradually brought

within the purview of the Legislature," and in particular they advised "that the process of revising the land revenue assessments ought to be brought under closer regulation by statute as soon as possible. At present the statutory basis for charging revenue on the land varies in the different Provinces, but in some at least the pitch of assessment is entirely at the discretion of the Executive Government. No branch of the administration is regulated with greater elaboration or care; but the people who are most affected have no voice in the shaping of the system, and the rules are often obscure and imperfectly understood by those who pay the revenue. The Committee are of opinion that the time has come to embody in the law the main principles by which the land revenue is determined, the methods of valuation, the pitch of assessment, the periods of revision, the graduation of enhancements and the other chief processes which touch the well-being of the revenue-payers. The subject is one which would probably not be transferred to Ministers until the electorate included a satisfactory representation of rural interests, those of the tenantry as well as of the landlords; and the system should be established on a clear statutory basis before this change takes place".

The fact remains that very little, if at all, has been done to carry out the recommendations of the Committee. It may be said that inasmuch as the electorate does not include a satisfactory representation of rural interests, that is, those of the tenantry as well as of the landlords, nothing can be done at present in this direction. It is true that the tenantry is not directly represented in many of the Councils. But the fact remains that the landlords are

nearly everywhere very well represented, and in some Provinces, *e.g.*, the United Provinces, they enjoy considerable political power and constitute the Ministry. So far as the middle classes are concerned, their representatives have generally supported the cause of the tenants. There is no reason why action should not have been taken hitherto to give effect to these recommendations, and it may be hoped that if action is proposed to be taken even now, with the support of the reasonable section of the Zamindars and the general representatives in the Councils, the result of such action will go far to fulfil the expectations of the Joint Select Committee and to meet the growing demand for bringing land revenue assessments under closer regulation by statute.

So far as a Bill is concerned, the Governor has got the right of veto to begin with ; but where he gives his assent, it has to be followed by the assent of the Governor-General, and until that assent is given, it does not become an Act. The Governor-General may withhold his assent, but must give his reasons in writing for his veto (S. 81). There is, further, the direct veto of the Crown provided by S. 82.

In the case of Bill passed by Local Legislatures, the Governor has got the right to return a Bill to the Council for reconsideration either in whole or in part, together with any amendments which he may recommend. Or, in cases prescribed by rules under this Act, he may, and, if the rules so require, shall, reserve the Bill for the consideration of the Governor-General. Action was once taken under this Section in the U.P., when a Bill was returned to the Council, and in Madras, the Hindu Religious Endowments Bill was reserved for

the consideration of the Governor-General. The provisions of S. 81 A should be read with the Reservation of Bills Rules already mentioned.

When a Bill has been reserved, the Governor may, within six months from the date of the reservation and with the consent of the Governor-General, return the Bill for further consideration by the Council with a recommendation. After such consideration, the Bill, if re-affirmed with or without amendment, is again presented to the Governor. A reserved Bill becomes law if the Governor-General gives assent within six months of its reservation. But if he does not give his consent within six months, it lapses; unless, before the expiry of the six months, the Governor has returned the Bill for further consideration, or, if the Council is not in session, the Governor publishes his intention to return the Bill at the commencement of the next session. Attention has already been drawn to similar powers of return in the Australian and South African Constitutions which are very much simpler, probably because the Central Government there does not exercise such strict control over the Provincial Legislatures. In the case of Bills which are not reserved, the Governor-General has the further power of reserving them without assenting to or withholding his assent for the signification of His Majesty's pleasure. And in such a case the Act shall not have validity until the pleasure of the Crown is known. S. 84 also removes doubts as to the validity of certain Indian laws.[1]

[1] A law made by any authority in British India shall not be deemed invalid solely on account of any one or more of the following reasons:

(a) In the case of an Act of the Indian Legislature or a Local Legislature, because it affects the prerogative of the Crown; or

S. 67, clause 7, and S. 78, clause 4 provide for immunity of the members of the Indian Legislature from any proceedings by any Court by reason of their speeches or votes in those bodies, or by reason of anything contained in any official report of the proceedings, it being laid down that there shall be freedom of speech in the Indian Legislature and the Councils.

Judicial authorities have already laid down that the *lex et consuetudo parliamenti* has no application to Colonial Legislatures. In an opinion given by the Attorney-General and the Solicitor-General so far back as 1856, they said that the law and practice of Parliament, as established in the United Kingdom, are not applicable to Colonial legislative assemblies, nor does the rule of one body furnish any legal analogy for the conduct of another. Such claim was disallowed in the case of Newfoundland (See Kielley *vs.* Carson, 4 Moore's P. C., 63; Barton *vs.* Taylor, U. A. C., p. 197, a case from N. S. Wales; further, Fielding *vs.* Thomas, a case from Nova Scotia). The Canadian Constitution, however, expressly provides that the privileges, immunities and powers of the Canadian Parliament shall be such as are from time to time defined by an Act of the Parliament of Canada, but they shall not exceed those exercised

(*b*) in the case of any law, because the requisite proportion of non-official members was not complete at the date of its introduction into the Council or its enactment; or

(*c*) in the case of an Act of a Local Legislature, because it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects as that Legislature, by Acts duly made, could lawfully confer on Magistrates in the exercise of authority over other British subjects in the like cases; *vide* S. 84 (1).

by the House of Commons in England (S. 18, British North America Act). Similar powers have been taken in other Constitutions such as the Victoria Constitution Act, 1855, S. 35, and the South Australia Constitution 1855-6. There is no good reason why powers should not be reserved to the Indian Legislature and the Provincial Councils to provide in the manner of the Canadian Parliament for their own parliamentary privileges and immunities.

PART VIII

SALARIES, LEAVE, PENSIONS

THE salaries of the Governor-General and other persons mentioned in the second Schedule to the Act are guaranteed to come out of the revenues of India. The maximum in the case of each is prescribed by the Schedule. These "other persons" are the Governors, the Commander-in-Chief, the members of the Executive Council of the Governor-General and of the Executive Councils of the Governors. So far as the salary of the Governor-General is concerned, the position in the Dominions is as follows: In Canada, Australia and South Africa, the salary is £10,000, and it is a charge on the consolidated revenue fund, in Canada it being the third charge (*vide* S. 105 of the British North America Act which gives the Parliament of Canada the power to alter the salary; S. 3 of the Commonwealth of Australia Constitution Act which gives the Commonwealth Parliament power to modify it, but not during the continuance in office of a Governor-General; S. 10 of the South Africa Act which is also similar to the Australian provision). This difference between the powers of the Colonial Legislatures and the Indian Legislature is easily intelligible. But there is also another difference. The Colonial statutes referred to above do not provide for any

allowance in addition to the salary; the Indian statute does. Under S. 85, equipment and voyage allowances may be allowed by the Secretary of State in Council.

The remuneration payable to a person under this section is declared to be "the whole profit or advantage which he shall enjoy from his office during his continuance therein". But this does not affect the allowances or other forms of profit or advantages which may be sanctioned by the Secretary of State in Council for such persons. The second part of S. 85 also provides that an order affecting the salaries of members of the Governor-General's Executive Council may not be made without the concurrence of a majority of the votes at a meeting of the Council of India.[1] Does that imply that the Secretary of State himself may pass orders affecting the salaries of other persons than those who are mentioned in S. 85 (1)? Such an implication would hardly be consistent with the spirit of the section; and yet there does not seem to be any good reason why proviso (*a*) should have been limited to members of the Governor-General's Executive Council. The Governor-General in Council may grant leave of absence to any member of the Council other than the Commander-in-Chief; and so also a Governor in Council and a Lieutenant-Governor in Council may grant leave of absence, but it must be under a medical certificate and for a period not exceeding six months. Absence exceeding six months has the effect of making the office vacant. If the Governor-General, or a Governor, or the Commander-in-Chief, and save in the case of absence on special duty or on leave under a

[1] Compare with this S. 69 of the South Africa Act, 1909: "The salaries of the administrator shall be fixed and provided by Parliament and shall not be reduced during their respective terms of office."

medical certificate, if any member of the Executive Council of the Governor-General (other than the Commander-in-Chief) or any member of the Executive Council of a Governor, or a Lieutenant-Governor, departs from India, intending to return to Europe, his office thereupon becomes vacant. Provision is made in the statute for the filling of temporary vacancies in the case of the Governor-General and Governors and members of the Executive Council. Only Governors of the Presidencies in their order of priority of appointment as Governors can hold the office of the Governor-General, Governors of the other Provinces not being eligible. Until such a Governor assumes office, the Vice-President, or, in his absence, the senior member of the Executive Council holds and executes the office of Governor-General.

In the case of a vacancy of a Governor, when there is no successor on the spot, the Vice-President, or, if he is absent, the senior member of his Executive Council, or, if there is no Council, the Chief Secretary to the Local Government temporarily holds the office. This is the section which incidentally provides a statutory recognition of the office of Chief Secretary. In the case of a vacancy in the office of a member of the Governor-General's Council, (other than the Commander-in-Chief), or a member of the Executive Council of a Governor, there being no successor on the spot, the Governor-General or the Governor, as the case may be, may appoint a temporary member. The temporary member receives half the salary of the member of Council whose place he fills and also half the salary of any other office which he may hold, if he holds any such office, the remaining half of such last-named salary

being at the disposal of the Governor-General in Council or Governor in Council, as the case may be. The temporary member must be possessed of qualifications required in the case of a permanent member. S. 94 of the Government of India Act gives power to the Secretary of State in Council to make rules as to leave, pay, salary and allowances during the period of leave. The concurrence of a majority of the votes of the members of the India Council is necessary.

As regards military appointments, the Secretary of State, with the concurrence of a majority of the Council of India, has the power of making rules for distributing between the several authorities in India the power of making appointments to and promotions in the military appointments under the Crown in India. He may also reinstate military officers and servants suspended or removed by any of those authorities. This section only shows that constitutionally even the Secretary of State's power in regard to such appointments is at best very limited by reason of the peculiar position of the Army in India.

S. 96 is an important constitutional section. It provides that no native of British India, nor any subject of His Majesty resident therein, shall by reason only of his religion, place, birth, descent or color be disabled from holding any office under the Crown in India. Under S. 96 A, rulers and subjects of Indian States are also declared eligible for appointment to civil and military offices under the Crown in India, subject to any conditions or restrictions imposed by the Governor-General in Council with the approval of the Secretary of State in Council.

PART IX

THE CIVIL SERVICES IN INDIA

PART VII A of the Government of India Act consists of four sections of which two, namely, 96 B and 96 C, relate to the Civil Services in India. S. 96 C provides for the appointment of a Public Services Commission consisting of not more than five members of whom one shall be the Chairman appointed by the Secretary of State in Council. Their qualifications, pay and pensions may be prescribed by rules made by the Secretary of State in Council. The statute requires that this Commission shall discharge, in regard to the recruitment and control of the public services in India, such functions as may be assigned thereto by rules made by the Secretary of State in Council. The Public Services Commission, will not be independent of the Secretary of State; on the contrary, it will derive its powers from him.

The Lee Commission say in their Report, regarding the statutory Public Service Commission contemplated by the Government of India Act, that so far as the duty of recruitment for the All-India Services is concerned, it shall be discharged as by the agent of the Secretary of State. In respect of the Central Services and the Provincial Services, the Commission should act as the agent of the

Secretary of State, the Government of India or the Local Governments, as the case may be. Of course, the basis of those recommendations is that the final responsibility for the All-India Services rests with the Secretary of State. Public Service Commissions have been appointed in the Dominions; for instance, in Australia, where the Commonwealth Public Service Act was passed in 1902, putting the regulation of its servants on a statutory basis, a Public Service Commissioner has been appointed. Speaking of him, Moore says:

> It remains to speak of the Public Service Commissioner, upon whom lies the burden of administering the Act and upon whose integrity, judgment and courage depends, in the main, the reconciliation of the various aims and interests which meet in the organisation and working of the Service. He is at once administrator, adviser and critic, responsible not merely or mainly to his political chief, but also to Parliament. For these reasons, security of tenure and of salary are granted. But so much depends on the efficient performance of his duties, and this again depends so much on the personal qualities of the officer, which can only be tested by experience, that his appointment is for a fixed term of seven years and not for life. He is required to present an annual report for submission to Parliament on the condition and efficiency of the Service, on his own proceedings and those of his inspectors, with suggestions for "improving the method of the working of the Public Service and especially for ensuring efficiency and economy therein in any department or subdivision thereof". In this report he is charged, like the Auditor-General, with the duty of calling attention to any breaches or evasions of the law which may have come under his notice. His duties in relation to appointments and promotions have been considered. He has a staff of inspectors who enjoy the same tenure as himself and through them he ascertains the nature, value and quality of the work of all officers. By this means he is able to classify the work of the officers, and to learn enough of the personal qualities of the individual servant to guide him in dealing with appointments and promotions. He is not, however, dependent solely on his own staff; he may call on the departments for reports

and may hold enquiries. In relation to the classification of officers and the arrangement of work in the department, the duty of the Commissioner is to present recommendations and proposals to the Government, and upon these a special procedure is established. The Government may proceed to give effect to them, or may reject them. If they are rejected, the Commissioner proceeds to a reconsideration of the matter with a view to further recommendations or proposals, and a statement of the reasons for rejection must be laid before Parliament (Moore, *The Commonwealth of Australia*, pp. 194-6).

S. 141 of the South Africa Act says:

(1) As soon as possible after the establishment of the Union, the Governor-General in Council shall appoint a Public Service Commission to make recommendations for such reorganisation and readjustment of the departments of the Public Service as may be necessary. The Commission shall also make recommendations in regard to the assignment of officers to the several Provinces.

(2) The Governor-General in Council may, after such Commission has reported, assign from time to time to each Province such officers as may be necessary for the proper discharge of the services reserved or delegated to it, and such officers on being so assigned shall become officers of the Province. Pending the assignment of such officers, the Governor-General in Council may place at the disposal of the Provinces the services of such officers of the Union as may be necessary.

(3) The provisions of this Section shall not apply to any service or department under the control of the Railway and Harbor Board, or to any person holding office under the Board.

S. 142. After the establishment of the Union, the Governor-General in Council shall appoint a permanent Public Service Commission with such powers and duties relating to the appointment, discipline, retirement and superannuation of public officers as Parliament shall determine.

In Australia, the Commonwealth Parliament recently passed the Commonwealth Public Service Act No. 21 by which a Board of three Commissioners

instead of a single Public Service Commissioner has been appointed (See the discussion in *The Journal of Comparative Legislation*, III Series, 1924, Vol. 6, Part II, pp. 59-61). The analogy perhaps between the Dominion Public Services and the Indian Services is not altogether true, inasmuch as the powers and the functions of the All-India Services at any rate are in some respects very different from those in the Dominions. But the essential fact remains that by reason of there being Responsible Government there, the Public Services Commissions derive their powers from, and hold themselves responsible to, their respective Governments. In India, it will be, under the present Constitution, quite the contrary. Indian opinion, however, is emphatic that the functions which the Secretary of State discharges in relation to the All-India Services should be discharged in future by the Government of India. It may be that, later on, the Provincial Governments may claim to hold themselves responsible independently for the organisation and control of their Services. Meanwhile, these powers of the Secretary of State should be transferred to the Government of India. This no doubt raises the question as to whether the Services are prepared to accept this change. That they are not so prepared is clear. Under the present system the Services may look up to the Secretary of State for the protection of their rights, but it is obvious that such a claim on the part of the Services is wholly inconsistent with the idea of Responsible Government in India. If and when the idea of conferring on India Dominion status is seriously entertained, the question of the Services will have to be solved consistently with that status.

What, then, is the present constitutional position? Public servants hold their office during the pleasure of the Crown (*vide* S. 96 B). But no person holding an appointment in the Civil Services in India can be dismissed by any authority subordinate to that by which he was appointed; and a dismissed person has the right of appeal to the Secretary of State. If any officer appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's Province, he has a right of complaint to the Governor, and the Governor is bound to enquire and pass such order as may appear to him to be just and equitable. The Instrument of Instructions to the Governor charges him with safeguarding all the rights of the Services in the legitimate exercise of their functions and in the enjoyment of all recognised rights and privileges. This provision would make it difficult for any Minister to deal effectively with an erring member of an All-India Service; and howsoever a provision like this may be put up with now, it is clear that in any scheme of real and full Responsible Government it will be wholly out of place.

The second clause of S. 96 B gives the Secretary of State in Council power to make rules for regulating the classification of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, discipline and conduct. The Secretary of State has framed a certain number of rules. He may also delegate the power of making rules to the Government of India, or to the Local Governments, or authorise the Indian Legislature or the Local Legislatures to make laws for regulating the Public Services. This power of making rules has not been delegated to the Government of India, or to

the Local Governments. In any case, reading this section with S. 97, which deals specifically with the Indian Civil Service, it seems difficult to hold that the Governor-General in Council or the Local Governments could make rules, or the Indian Legislature or the Local Legislatures could make laws affecting the matters dealt with by S. 97.

The proviso to S. 96 (2) has given rise to a considerable amount of controversy. Every person appointed to the Civil Service by the Secretary of State before the commencement of the Government of India Act of 1919 shall retain, so the Act provides, all his existing or accruing rights, or shall receive such compensation for the loss of them as the Secretary of State in Council may consider just and equitable. In paragraph 81 of the Lee Commission Report is quoted the despatch of the Secretary of State, dated 26th April, 1923. It seems that the Law Officers of the Crown were of the opinion that the words "accruing rights" in S. 96 B (2)

> mean all rights to which members of the Civil Service are entitled, whether by statute, or by rule having statutory force, or by regulation in force at the time of their entry into service. They do not, however, include prospects of promotion, except in cases where the promotion is no more than advancement by seniority to increased pay, as in the case of the various appointments borne upon the ordinary lists of time-scales of pay. In particular, they do not apply to general expectations of possible appointment to offices, such as those of Commissioner of a Division, which are not included in the ordinary time-scale lists, and the filling of which involves selection by merit. . . . The abolition of such appointments would give rise to no claims to compensation except to persons who were actually holding them at the time of their abolition. . . . No method of filling such appointments which is not inconsistent with the statute, even though it reduced the expectations of

members of a particular service, would give rise to any claim to compensation on the part of any person whose actual tenure of an appointment was not thereby affected. . . . The proviso to S. 96 B (2) applies not only to loss of rights (as defined above) resulting from the provision of rules framed by the Secretary of State in Council in pursuance of the provisions of that sub-section, but also to a loss of rights resulting from rules or laws made by other authorities in exercise of powers delegated to them under the provisions of the same sub-section by the Secretary of State in Council.

It may be pointed out here that the expression, "existing and accruing rights," also occurs in S. 144 of the South Africa Act, 1909.

The Civil Services, on the other hand, as appears from paragraph 82, claim that the intention of the proviso was to secure for them their prospects of promotion to all higher posts existing at the time when the Act was passed, or, alternatively, compensation for the loss of such prospects through the abolition of these appointments. The question of intention is at best a matter of speculation. But the claim of the Services seems to be hardly reasonable. For, if that were well-founded, no single higher post existing at the time of the passing of the Act could be abolished, howsoever strong might be the justification for such abolition, since that would be scarcely consistent with an intention to give real Responsible Government.

From paragraph 83 of the Lee Commission's Report, it appears that the Services expressed to the Commission "their anxiety with regard to the future security of their pensions," and "their grave concern at the prospect of future constitutional developments". The Commissioners say: "We do not share this apprehension under existing circumstances; and we assume that if any statutory

change is made hereafter, involving the transfer of the financial control in this regard, now exercised by the Secretary of State in Council, adequate provision would at the same time be made for safeguarding service pensions." They also suggest that as regards emoluments generally, the most practical form of safeguard would be a mutually binding legal covenant, enforceable in the civil courts between the officer and the authority which has appointed him.

In any scheme of Responsible Government, it would be necessary to safeguard the interests of the Services; that is to say, to provide that their salaries and pensions shall not be adversely affected by the introduction of any constitutional change. It is suggested that in addition to the legal covenant there should be a statute passed or provisions made in the Constitution Act similar to those in the South Africa Act, 1909.

S. 143 of the South Africa Act says:

Any officer of the public service of any of the Colonies at the establishment of the Union who is not retained in the service of the Union, or assigned to that of a Province, shall be entitled to receive such pension, gratuity, or other compensation as he would have received in like circumstances if the Union had not been established.

S. 144.—Any officer of the public service of any of the Colonies at the establishment of the Union, who is retained in the service of the Union, or assigned to that of a Province, shall retain all his existing or accruing rights and shall be entitled to retire from the service at the time at which he would have been entitled by law to retire, and on the pension or retiring allowance to which he would have been entitled by law in like circumstances if the Union had not been established.

S. 146.—Any permanent officer of the Legislature of any of the Colonies who not retained in the service of the

Union, or assigned to that of any Province, and for whom no provision shall have been made by such Legislature, shall be entitled to such pension, gratuity, or compensation as Parliament may determine.

The Indian Civil Service occupies a peculiar position in India. In a sense it corresponds to the permanent Civil Service in England, but in point of fact, until the present Act came into force, it was the repository of actual political power in India; and even now, notwithstanding Diarchy in the Provinces and elected majorities in the Indian Legislature and the Legislative Councils, it still continues to enjoy a very large measure of political power. In the Dominions, the position of the Civil Service has been very different from that in India. There they have had to struggle against political influences and intrigue (see Chapter 8| on the Civil Service in Keith's *Responsible Government in the Dominions*, Vol. I, where after reviewing the position in each Dominion, he sums up the position as follows: "It is as yet impossible to attribute to the Dominion Civil Services the importance which attaches to the Imperial Civil Service, but the trend of events and the growth of the Dominions will, it may be presumed, ultimately render the Civil Service more and more worth the attention of the best educated classes of the community"). In the well-known Tilak case (1916, 19 Bom. L. R., p. 211) Batchelor, J., expressed himself as follows: "The Government established by law acts through human agency, and admittedly the Civil Service is its principal agency for the administration of the country in times of peace." Though this statement was made in relation to the law of sedition, yet it

seems to represent the true political position, excepting that in certain departments in Local Governments, Ministers now have got, constitutionally, the shaping of policy in their hands. Being the premier Service, there is a special part of the Act devoted to it. Entrance into the Civil Service lies ordinarily through the open door of competitive examination, though in recent years some nominations also have been made. The Secretary of State in Council makes rules, with the assistance of Civil Service Commissioners, for the examination which is conducted under their superintendence. Rules also prescribe the age and qualifications of candidates and the subjects of examination, and all rules made under this section (97) are laid before Parliament within fourteen days of their being made, or if Parliament is not sitting, then within fourteen days after the next meeting of Parliament. There are certain appointments which are reserved for the Indian Civil Service and they are indicated in the third Schedule to the Act. The offices of Secretary, Joint Secretary, Deputy Secretary in every department, except the Army, Marine, Education, Foreign, Political and Public Works Departments of the Government of India must be filled by members of the Indian Civil Service. In the case of the Legislative Department, if the office of Secretary or Deputy Secretary is filled by a member of the Indian Civil Service, then the office of Deputy Secretary or Secretary in that Department, as the case may be, need not be so filled. Three offices of the Accountant-General are reserved for the Indian Civil Service. In the Provinces which were known as "Regulation Provinces" in 1861, the Schedule reserves

the following offices for the Indian Civil Service: (1) Member of the Board of Revenue, (2) Financial Commissioner, (3) Commissioner of Revenue, (4) Commissioner of Customs, (5) Opium Agent, (6) Secretary in every department except the Public Works and the Marine Departments, (7) Secretary to the Board of Revenue, (8) District and Sessions Judge, (9) Additional District or Sessions Judge, (10) District Magistrate, (11) Collector of Revenue or Chief Revenue Officer of a District. The Act further provides that all such offices as may be created hereafter shall be filled by the members of the same Service. The next two sections (99 and 100) allow persons not belonging to this Service being appointed, subject to certain rules, to certain offices reserved for the Indian Civil Service. Under S. 99, persons of proved merit and ability domiciled in British India and born of parents habitually resident in India may be appointed to such offices. The rules may be made by the Governor-General in Council and sanctioned by the Secretary of State. The Governor-General in Council may pass a resolution defining the qualifications of such persons, but such a resolution must receive the sanction of the Secretary of State in Council and cannot have force until it has been laid for thirty days before both Houses of Parliament. Similarly, such reserved appointments may be given to any other person as a special case who has before his appointment fulfilled all the tests, if any, which could be imposed in a like case on a member of that Service, and who has resided for at least seven years in India. But such appointments are provisional and are subject to the sanction of the Secretary of State being given within

twelve months. There are now what are known as "listed appointments" in the Provinces, the number of which vary from Province to Province; and these appointments, though reserved for the Indian Civil Service, are thrown open to the Provincial Services. In the Government of India too, just a few Secretariat appointments have been held in recent years by persons not belonging to the Indian Civil Service.

The future of the Services is intimately connected and associated with constitutional developments in this country. And it is generally feared that any decisions with regard to the future of the Services arrived at in advance and independently of those relating to constitutional advance are bound to prejudice the latter.

NOTE:—An Auditor-General in India is appointed by the Secretary of State in Council and holds office during the pleasure of the Crown. The Secretary of State makes provision by rules for his pay, powers, duties and conditions of employment, or for the discharge of his duties in the case of a temporary vacancy or absence. In England, the Auditor-General holds office during good behavior (29, 30 Vict., Chap. 39, S. 3.)

PART X

THE JUDICIARY

IT is not intended in this volume to trace the history of the Judiciary in India, or to refer to the subordinate Judiciary. The present constitution of the High Courts is contained in Part IX of the Government of India Act. The High Courts in the Presidencies combine in themselves the functions of the old Supreme Courts and the Sadar Courts. They all have original jurisdiction; that is to say, they try civil and criminal cases arising within the Presidency towns as Courts of first instance or Sessions Courts. The High Court at Allahabad, which was established in 1865, has always been an appellate Court, excepting that it has original jurisdiction to try matrimonial or probate cases. The Patna High Court, which was established in 1916, is also similar to the Allahabad High Court. Another High Court established on the same model is the Lahore High Court which was established in 1919. The Burma High Court is the latest; it has an original side and, like the Presidency High Court, it also exercises Admiralty jurisdiction.

Each High Court has got its Letters Patent defining its jurisdiction. These Letters Patent may be amended from time to time by the Crown by further Letters Patent. The High Courts have no original

jurisdiction in any matter concerning revenue or concerning any act ordered or done in the collection thereof, according to the usage and practice of the country or the law for the time being in force [*vide* S. 106 (2)]. The original Act establishing the High Court was an Act of Parliament (24, 25 Vict., Chap. 104). The High Courts are Courts of record, and exercise powers of superintendence over all Courts subject to their appellate jurisdiction, and have certain specific powers given to them under S. 107 under which is the power of making rules, forms and tables of fees with the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and, in other cases, of the Local Government concerned. The Governor-General in Council has got the power to alter the local limits of jurisdiction of High Courts subject to such order being disallowed by the Crown (S. 109). By S. 113, the Crown has got the power of establishing by Letters Patent any additional High Court and conferring the ordinary jurisdiction, powers and authority vested in any High Court, existing at the commencement of the Act. The Benches are constituted by the Chief Justice. High Courts have got the power to make rules providing for the exercise, by a single Judge or more Judges, or by division Courts constituted by two or more Judges, of the original or appellate jurisdiction vested in them.

The High Courts everywhere are Courts of equity and law and exercise a mixed jurisdiction. In regard to the High Courts at Calcutta, Madras and Bombay, S. 112 provides that in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras and Bombay in matters relating to succession of lands, or

goods, and in matters of contract, and in dealing with party and party when both parties are subject to the same personal law and custom, the High Court shall decide according to the personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the custom or law to which the defendant is subject.

COMPOSITION OF HIGH COURTS

Each High Court consists of a Chief Justice and a certain number of Judges who are appointed by the Crown. The maximum number of Judges of a High Court, including the Chief Justice and additional Judges, is twenty, though that number exists nowhere. For Judges certain qualifications are necessary. A Judge of the High Court must be (*a*) a barrister of England or Ireland or an advocate of Scotland of not less than five years' standing; or (*b*) a member of the Indian Civil Service of not less than ten years' standing and having for at least three years served as, or exercised the powers of, a District Judge; or (*c*) a judicial officer of the standing of a Subordinate Judge or a Judge of the Small Cause Court having held that office for not less than five years; or (*d*) a pleader of a chartered High Court or any other Court exercising the powers of a High Court within the meaning of S. 3, clause 24 of the General Clauses' Act, provided he is a pleader of not less than ten years' standing. There are certain proportions too prescribed for different classes of Judges; not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be

such barristers or advocates as aforesaid, and not less than one-third must be members of the Indian Civil Service.

It will be noticed that this proviso guarantees certain proportions to barristers of England or Ireland and advocates of Scotland and members of the Indian Civil Service, but affords no such guarantee to pleaders of High Courts or to Subordinate Judges or Judges of a Small Cause Court. There is a considerable amount of opinion now that the time has come when the reservation in favor of members of the Indian Civil Service should be done away with, and the High Court should in future, as in England, consist of trained lawyers. It is true that in the past the Indian Civil Service has supplied some very eminent Judges to the High Courts, but they have been exceptions. The present experience is that the average civilian Judge's knowledge of the personal laws of the country and some branches of civil law leaves much to be desired. Besides, the early training of a civilian gives a bent to his mind which at times seriously affects his utility on the Bench. It is true that the civilian Judge brings with him on the Bench an intimate knowledge of the rent and revenue laws of the country and a certain amount of the knowledge of the customs and habits of the people which is totally lacking in the case of a lawyer Judge fresh from England. But this knowledge can be furnished by competent and experienced Indian lawyers as well. Again, whatever justification there might have been at one time to import Judges from England, there seems to be hardly any now. Most of our law has been codified. The rules of practice and procedure in the High Courts are well settled. The standard of knowledge of the Bar is, generally speaking, much higher than it was thirty

years ago. It is true that an English barrister brings direct knowledge of English equity, law and procedure. But this direct knowledge is by no means so indispensable that, merely for the sake of it, this statutory lien in favor of English and Irish barristers and Scottish advocates should be maintained. Roughly speaking, the salary of a High Court Judge, deducting income-tax, comes to about £3,000 a year. It is obvious that a man in good practice in England making an income of £2,000 to 3,000 would not ordinarily feel attracted to an Indian judicial career on those terms when it is admitted that the cost of living in India in the case of Europeans has considerably gone up. At times we get a good Judge from England to a High Court; but there are also bad bargains. In any case, the superiority of the Judge from England to indigenous talent is by no means now an admitted fact. And after all it is far better that a Judge of an Indian High Court should know more of his Indian codes and Hindu and Muhammadan Law than the rules of the Chancery Court or the practice of the King's Bench Division. In the Presidency towns, a number of Indian barristers have achieved distinction in commercial cases, and it is by no means uncommon to see them representing European clients. It is, therefore, suggested that these statutory guarantees should disappear, and the High Court should, in course of time, be composed of trained and experienced lawyers. This does not by any means mean that English barristers practising in India should be excluded, though it must be borne in mind that their number everywhere has been steadily going down.

Again, the proviso under consideration has been taken to imply that the Chief Justice must always be a

barrister. That is an interpretation which is at least open to doubt. The Government of India has several times been invited to remove this disability. Resolutions have been moved and questions have been put. The position is that an Indian vakil Judge may officiate as Chief Justice, but he cannot be confirmed. Some of the most eminent Indian Judges, like Sir Ashutosh Mukerjee, Sir Subramania Aiyar, Sir Narayan Chandavarkar, Sir Pramoda Charan Bannerjee have officiated as Chief Justices, but under this interpretation they could not be confirmed. In addition to the permanent Judges, there are additional Judges. But such Judges can be appointed only by the Governor-General for a period not exceeding two years. When the Chief Justice is absent on leave, one of the Judges of the same High Court is appointed to act as Chief Justice by the Governor-General in Council in the case of the Calcutta High Court, and by the Local Government in the case of any other High Court. If there is a vacancy in a High Court, the Governor-General appoints a duly qualified person in the case of the Calcutta High Court, and a Local Government in the case of any other High Court. The salaries of the Judges of High Courts are not votable. and the power of fixing their salaries and allowances, furlough, pensions and expenses for equipment and voyage rests with the Secretary of State in Council. If a Judge dies during his voyage to India, or six months after his arrival in India, the Secretary of State is bound to pay to his legal personal representatives, out of the revenues of India, such sum of money as will, with the amount received by, or due to, him at the time of his death on account of salary, make

up the amount of one year's salary. Similarly, if he dies *after* the expiration of six months of his arrival in India, the Secretary of State is bound to pay to his legal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary. These rules obviously cannot apply to Indian Judges or civilian Judges appointed in India. They are meant exclusively for the benefit of English lawyers sent out to High Courts from England.

The Judges in India do not hold their office during good behavior, but during the pleasure of the Crown. "Since 1700, it has been the general policy of the Legislature," says Maitland in his *Constitutional History of England*, p. 429, "to secure the independence of the Judges by making their tenure of office tenure during good behavior. The Judges of the superior Courts hold office during good behavior, but can be dismissed on an address presented by both Houses of Parliament."

In the Dominions, Judges are appointed by the Governor-General and the Judges of the Provincial Courts in Canada are selected from the respective Bars of those Provinces. They hold their office during good behavior, but are removable by the Governor-General on an address of the Legislature (*vide* Ss. 96, 97, 98, 99, British North America Act, 1865; S. 72 Commonwealth of Australia Constitution Act, 1900; Ss. 100, 101, of the South Africa Act, 1909).

THE PRIVY COUNCIL

The Privy Council is not a Court of criminal appeal from India or the Colonies. It has, since the decision in

Dillet's case, refused to admit criminal appeals excepting when something has been done which is opposed to natural justice. In civil matters, where the value of the subject-matter is above Rs. 10,000, and the High Court differs from the lower Court, or where the High Court affirms the decision of the lower Court, but a substantial question of law arises in the case, an appeal lies to the Privy Council. Apart from these conditions, the High Court may certify in any special case that in its opinion it is a fit case for appeal to the Privy Council, and the Privy Council, as exercising the prerogative of the Crown, has always the right of admitting any appeal. The Judicial Committee of the Privy Council was constituted in 1833. It consists of the President of the Council, the Lord Keeper or the First Lord Commissioner of the Great Seal of England, and all Privy Councillors who have held these offices, or hold or have held a high judicial office such as Lords of Appeal in Ordinary, Judges of the Supreme Court of England or Ireland, or the Court of Session in Scotland. The King has the power to appoint to the Judicial Committee Privy Councillors who are or have been Judges of the Supreme Court of Canada, or of a Superior Court of the Dominion, or of New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria, Western Australia, the Cape of Good Hope or Natal, or of any other British possession fixed by order in Council, or the Chief Justice or Justices of the High Court of Australia or the Chief Justice or Judges of the Supreme Court of Newfoundland, or Judges of the Superior Court of Transvaal or of the Orange River Colony. Any member of the Privy Council, being or having been the Chief Justice or a Judge of any High Court in

British India, can, by direction of His Majesty, be made a member of the Judicial Committee, but there must not be more than two such members at the same time (See Halsbury's *Laws of England*, Vol. IX, pp. 27-28). There have been proposals before the Government of India and the Secretary of State as well as before the Lord Chancellor recently for a better representation on the Board of Indian judicial experience. Meanwhile it must be said that during the last ten years dissatisfaction has been growing in this country with the manner in which certain questions of personal law in particular have been disposed of by the Privy Council. Reference may here be made particularly to the present state of uncertainty with regard to the law relating to impartible estates and the liability of a Hindu son to pay the antecedent debts of his father. The proposal to appoint more Indian Judges and to ask them at an advanced stage of their life to stay in England for a number of years is as unpromising as the proposal to invite English Judges of the Privy Council to come out to India.

A SUPREME COURT FOR INDIA

For this reason, and also because it is felt that a country marching towards Responsible Government should have a Supreme Court of appeal of its own, the feeling has in recent years been expressed more than once in the Indian Legislature that India should have a Supreme Court. The arguments for and against it may be summarised as follows: (1) The Privy Council is a truly

Imperial body and one of the most important connecting links between the Crown and India. The answer to that is that it is not proposed to break the link. The King's supreme prerogative of appeal shall remain unaffected, but instead of every appeal on facts which can go to the Privy Council now going up there, only certain classes of appeal, involving substantial questions of general interest in suits of certain pecuniary value, which must be higher than the present pecuniary limit, should in future go to the Privy Council. Similarly, with the growing Constitution of India, questions of great constitutional importance, should be allowed to go to the Privy Council. (2) It is said that it would be difficult to secure the necessary legal talent in India. So far as this objection is concerned, the answer to it is furnished by the records of some of the most eminent Indian Judges and lawyers. It is impossible seriously to contend that six competent well-read and independent Judges for that Court cannot be secured in India. (3) It is urged that the question of location would be a very serious one. It cannot be located in Delhi for the reason, *inter alia*, that it does not possess a local Bar of the standing required for cases going before an ultimate Court of appeal, and it is also urged that if it is located at Delhi, the cost of bringing Counsel from High Courts will not be less heavy, and may be heavier, than the cost now incurred by litigants in engaging solicitors and Counsel in England. This no doubt is a serious difficulty, but it does not seem to be insoluble. There is no reason why this Court should not, in its entirety or in divisions, sit at different centres in certain terms to try local appeals. (4) It is further said that it may mean an additional expenditure

to the taxpayer. But the additional expenditure will be more than met by the satisfaction that it will accord to the public and by the facility which will be available for getting the differences of judicial opinion among the various High Courts authoritatively settled with greater ease than is possible under the present system. (5) The scale of fees in the Privy Council both of Counsel and solicitors is usually higher than in appeals in High Courts in India. And in recent years there has been an upward tendency. It is always a disadvantage to a litigant to send his appeal 6,000 miles away when he has no chance of coming into personal contact with his Counsel or solicitor.

The reorganisation of the Bar and the establishment of the Supreme Court in India should be an integral part of any further constitutional development. In the Dominions, such a Court has been established as part of the Constitution. Reference may here be made to Australia and South Africa in particular. S. 73 of the Commonwealth of Australia Constitution Act gives power to the Federal Supreme Court, otherwise called the High Court of Australia, to hear and determine appeals from all judgments, decrees, orders, and sentences (1) of any Justice or Justices exercising the original jurisdiction of the High Court; (2) of any other Federal Court, or Court exercising Federal jurisdiction; or of the Supreme Court of any State, or of any other Court of any State from which, at the establishment of the Commonwealth, an appeal lies to the Queen in Council; (3) of the Inter-State Commission, but as to questions of law only; and the judgment of the High Court in all such cases shall be final and conclusive. But no exception

or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which, at the establishment of the Commonwealth, an appeal lies from such Supreme Court to the Queen in Council. And it provides that the judgment of the High Court in all such cases shall be final.

In South Africa, S. 106 of the South Africa Act, 1909, makes the following provisions as to appeals to the King in Council:

> There shall be no appeal from the Supreme Court of South Africa, or from any division thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matter in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure: Provided that nothing in this Section shall affect any right of appeal to His Majesty in Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890.

Apart from these provisions, the Judicial Committee Act of 1844 gives a right to admit appeals from any Court in the Dominion whatsoever.

With regard to Canada, it must be observed that the British North America Act did not create a Court for the whole of Canada. S. 101 of the Act only allowed the Parliament of the Dominion to create a general Court of Appeal for Canada. The Provinces have power to provide for the constitution of Provincial Courts. The Supreme Court of Canada was constituted in 1875 as a general Court of Appeal. Appeals to the Privy Council

lie by special leave in every case. Appeals also lie directly to the Privy Council from the Supreme Courts of the several Provinces. The Governor-General in Council can invoke the original jurisdiction of the Supreme Court by referring to it important questions relating to the interpretation of the British North America Acts, 1867-1886, the constitutionality of any Dominion or any Provincial Act, the powers of the Parliament of Canada and the Legislatures of the Provinces or their Governments in any particular matter. This is purely an advisory jurisdiction, but the judgments of the Supreme Courts can be taken in appeal to the Privy Council.

The question of judicial appeals to the Privy Council has been several times taken up by the Imperial Conference. In 1907, General Botha moved that when Colonies were federated, or a Court of Appeal was established for a group of Colonies, it should be competent for the Legislatures of those Colonies to abolish any existing right of appeal from the Supreme Courts to the Judicial Committee of the Privy Council; that the decision of such a Court of Appeal should be subject to the right of the Court to grant appeal in such cases as might be laid down by the statutes under which it was established, but that the right to appeal by special leave from the Privy Council should not be curtailed (See Keith's *Responsible Government in the Dominions*, Vol. III, p. 1481). In subsequent years the question of an Imperial Court of Appeal has been mooted, and the present Lord Chancellor is supposed to be a strong advocate of it, but the idea has not materialised. It may, however, be apprehended that in the event of such an idea taking concrete shape, the position of India will

not be very much better than it is in its relation to the Privy Council.

Lastly, the chapter relating to High Courts in the Government of India Act also provides for the appointment by Letters Patent of the Advocates-General for Bengal, Madras, and Bombay, who may take for the Crown such proceedings as are taken in England by the Attorney-General. The Advocate-General of Bengal is the Law Officer of the Government of India. In the other Governors' Provinces, there are Government Advocates appointed by the Local Governments. In England and the Dominions, the Law Officers are appointed by the Government of the day, and there is no reason why the same practice should not be followed in India in the event of Responsible Government being established.

The suggestions therefore are as follows: (1) A Supreme Court, consisting of not less than six Judges and one President, should be constituted in India. (2) It should have the power of hearing appeals in civil matters, both on facts and law, from the High Courts in all suits or proceedings of the value of Rs. 10,000 or upwards. (3) No further appeal to the Privy Council should be provided from the judgment or order of the Supreme Court on facts, but an appeal may be allowed in any case of the value of a lakh of rupees or upwards only on a question of law, provided the Supreme Court certifies that it raises an important question of law of general interest, or that irrespective of the value of the suit or appeal, the case involves a substantial question of constitutional law or public interest. (4) The Supreme Court should consist exclusively of Judges selected from High

Courts who, before their appointment as Judges of the High Court, were members of the legal profession, or of Judges selected directly from the legal profession. (5) The Chief Justice of each High Court shall, in addition to those indicated above, be an ex-officio member of the Supreme Court; but he shall not sit in appeal from a judgment of the High Court to which he was a party. (6) Such Judges of the Supreme Court should hold office during good behavior, and their salaries should be laid down•by statute.

PART XI

SECOND CHAMBERS

IT is to be noticed that in the Central Legislature Parliament has provided a second chamber. But in the Local Legislatures, there are no second chambers. In the Central Legislature, there is no doubt that the more powerful chamber is and has been the Assembly. The franchise relating to the second chamber would seem to need broadening, so that it may be possible for a larger number of enlightened representatives of the conservative elements in society and of knowledge and administrative experience to enter that chamber. As matters stand, the chances for such men, as against landed magnates or mere representatives of wealth, are not favorable. The real political power is wielded by the Assembly. Some minor Bills are at times introduced for the sake of convenience in the Council of State. But Money Bills are always introduced in the Assembly. The Budget is laid before the Council of State, and it is invited to discuss it, but it has not the power of vote. The Finance Bill, however, goes to the Council of State, and it can make amendments and has, in point of fact, done so; but to this exception has been taken. On the other hand, it is argued that as the Council of State also

consists of elected members, there is no reason why it should not have an equal measure of power over Money Bills. It is, however, constitutionally wrong to make it the equal of the Assembly, notwithstanding the fact that it contains an elective element. The more generally accepted view seems to be that " it should be subordinated in financial legislation to the popular House . . . but should, for other kinds of legislation, be on the same footing. According to this theory, it will be entitled not only to initiate Bills, but also to amend and possibly reject Bills sent up from the latter, though it will recognise that in a trial of strength it may prove the weaker." (See Bryce, *Modern Democracies*, Vol. II, p. 448.) The present position of the Council of State corresponds to the one contained in this extract from Bryce. As regards the question, what is a Money Bill, reference may be made to its definition in the Parliament Act of 1911 :

> A Money Bill means a public Bill which, in the opinion of the Speaker of the House of Commons, contains only provisions dealing with all or any of the following subjects ; namely, the imposition, repeal, remission, alteration, or regulation of taxation ; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges ; supply ; the appropriation, receipt, custody, issue or audit of accounts of public money ; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to these subjects or any of them. In this sub-section, the expressions " taxation," " public money " and " loan " respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

Coming to the Local Legislatures, it may be pointed out that one of the questions which the Statutory Commission under S. 84 A will have to consider is

whether the establishment of second chambers is or is not desirable. In support of the establishment of second chambers, what Lord Bryce has said may be quoted here:

"Those modern thinkers and statesmen who have held that every well-framed Constitution should contain some check upon the power of the popular Assembly have usually found it in the creation of a second Assembly capable of criticising, amending, and, if need be, rejecting measures passed by the other chamber." (*Modern Democracies*, Vol. II.)

As regards the constitution of second chambers, the following passages from the same book may be found useful:

Unitary countries have adopted one or the other of the following methods: Some have assigned to the head of the Executive the right of nominating to sit in the second chamber any person he thinks fit. Others, while giving nominations to the Executive, have restricted its choice to persons above a certain age or belonging to specified categories, *e.g.*, men who have filled certain high offices, or who possess a certain amount of property, or who come from a titled aristocracy, or who occupy positions which qualify them to express the wishes of important professions. Thus the Italian Senators are nominated for life by the Crown, *i.e.*, by the Ministry. Spain, and Hungary before the destruction of the Austro-Hungarian Monarchy, had chambers with some hereditary peers and other persons chosen by electorates composed of persons holding property of a prescribed value. The Legislative Councils in four of the Australian States are elected by voters possessing a (low) property qualification. Another method is to vest the election in the members of various local bodies, or persons selected from them, such as are the "Electoral Colleges," created from the Councils of the *Departments* and of the *Arrondissements* and from the *Communes* in France. This plan, adopted also in Sweden and Portugal, has been termed "indirect election," or "popular election in the second degree," because the electors have been themselves elected by bodies chosen by the citizens.

Finally, in many countries, the members of the second chamber are directly elected by the people on the same suffrage as members of the other or " more popular " House, but in and by larger constituencies, so as to provide a second chamber less numerous than the first. This is the method used in all the States of the North American Union ; each of the State Senate, a body much smaller than the State Assembly or House of Representatives, is elected on manhood (or universal) suffrage, but in larger electoral districts, Federal Senators are also now (since 1914) elected by the people on a general vote taken over each State, and so are the members of the Senate in the Australian Federation. Direct popular election has also been adopted by the Czecho-Slovak Republic for its Senate, the electors being over twenty-six and the candidates required to be over forty-five years of age, and the term of office eight years.

The Dominion of Canada, a Federal State, has a Senate filled by the nominees of the Dominion Government selected in certain proportions from the nine Provinces which make up the Federation and, in so far, representing those component communities, though not chosen by them. Only two of the Provinces (Quebec and Nova Scotia) have a second chamber, and members of these are nominated for life by the Provincial Ministries (Bryce, *Modern Democracies,* Vol. II, pp. 439-40).

What exactly will be the basis of second chambers in the Provinces in India in future, is a matter which requires to be carefully considered in the light of the circumstances of each Province. It is clear, however, that on considerations of prudence, second chambers will on the whole be found useful as checks upon the undue haste of popular Houses.

PART XII

AMENDMENT OF THE CONSTITUTION

IN conclusion, it may be urged that there should be provision for the alteration of the Constitution. Similar provisions have been made in the Commonwealth of Australia and the Union of South Africa.

S. 128 of the Commonwealth of Australia Constitution Act says:

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses, the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned

House and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors, the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

S. 152 of the South Africa Act says:

Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered; and provided further that no repeal or alteration of the provisions contained in this Section, or in Sections thirty-three and thirty-four (until the number of members of the House of Assembly has reached the limit therein prescibed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in Sections thirty-five and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

It is suggested that provision may be made in the Indian Constitution for alteration of the Act similar to that in the South Africa Act, as it is more consistent with Indian conditions than that contained in the Commonwealth of Australia Constitution Act.

Printed by J. R. Aria, at the Vasanṭā Press, Adyar, Madras.